FILE COPY

FILED
FEB 19 1974

APPENDIX

VOLUME I—Pages 1a-45a

In the Supreme Court of the United States

October Term, 1973
No. 73-982

CITY OF PITTSBURGH,
Petitioner

v.

ALCO PARKING CORPORATION ET AL.,
Respondents

On Writ of Certiorari to the Supreme Court of Pennsylvania

Petition for a Writ of Certiorari Filed October 1, 1973.

Certiorari Granted January 7, 1974

Volume I

Docket Entries 1a

Complaint 4a

Exhibit "A", Ordinance No. 704 (printed in the Appendix to the Petition for Certiorari at pages 103a through 110a) 11a

Answer 12a

The Evidence:

Plaintiffs' Evidence:

H. W. Shepard, Jr.:

Direct Examination 18a

J. S. Buzzard:

Direct Examination 41a

Voir Dire Examination 49a

Direct Examination 60a

Cross-Examination 92a

Redirect Examination 131a

Recross-Examination 142a

Redirect Examination 144a

H. W. Shepard, Jr.:

Direct Examination 146a

Plaintiff's Evidence(Cont'd):

Cross-Examination 168a

Redirect Examination 192a

Recross-Examination 197a

J. T. Stabile:

Direct Examination 199a

Cross-Examination 214a

Redirect Examination 230a

P. B. Smith:

Direct Examination 236a

Cross-Examination 247a

Redirect Examination 258a

Recross-Examination 259a

S. P. Gline:

Direct Examination 260a

Cross-Examination 270a

Redirect Examination 271a

P. B. Smith:

Recross-Examination 272a

D. M. McNeil:

Direct Examination 274a

Cross-Examination 298a

Plaintiffs' Evidence (Cont'd):

Redirect Examination 326a

Recross-Examination 329a

Redirect Examination 352a

Defendant's Evidence:

G. J. Balzer:

Direct Examination 357a

Voir Dire Examination 369a

Direct Examination 375a

Volume II

Defendant's Evidence (Cont'd):

J. L. Crosetti:

Direct Examination 412a

Cross-Examination 422a

Redirect Examination 434a

Recross-Examination 435a

Redirect Examination 440a

Recross-Examination 441a

Redirect Examination 443a

W. E. Jordan:

INDEX TO RECORD

Defendant's Evidence (Cont'd):

Direct Examination 444a

G. J. Balzer:

Direct Examination 449a

Cross-Examination 450a

Redirect Examination 474a

J. R. McMahon:

Direct Examination 477a

Cross-Examination 481a

Redirect Examination 490a

Recross-Examination 493a

Exhibits:

Plaintiffs' Exhibits:

1 Date Pertaining to the Parking Operations of the Plaintiffs in the Pittsburgh Parking Tax Case 496a

3 Comparison of 1969 Receipts from the Business Privilege, Mercantile, and Parking Taxes, and the Number of Taxpayers or Business Facilities Paying Each Tax 597a

6 Parking Rates in Effect, 1969 and 1970 and 1967 and 1968 598a

7 Average Parking Rates 600a

Plaintiffs' Exhibits (Cont'd):

9 Ordinance No. 675 601a

10 Alco Parking Corporation, Allegheny Center Garage, Financial Statements, December 31, 1969 608a

11 Parking Study, Central Business District, Pittsburgh, Pennsylvania, 1969, prepared for Public Parking Authority of Pittsburgh, Pennsylvania, by Wilbur Smith and Associated, June 1970 614a

12 Statement, background and qualifications of Donald M. McNeil 687a

Defendant's Exhibit:

H Traffic study in the central business district of the City of Pittsburgh 691a

Adjudication and Decree Nisi of the Court of Common Pleas of Allegheny County (printed in the Appendix to the Petition for Certiorari at pages 84a through 102a) 732a

Exceptions to Decree Nisi 733a

Opinion and Final Decree of Court en banc, Allegheny County, Pennsylvania, (printed in the Appendix to the Petition for Certiorari at pages 78a through 83a). 736a

INDEX TO RECORD

Opinion of the Commonwealth Court of Pennsylvania (printed in the Appendix to the Petition for Certiorari at pages 56a through 77a)	737a
Petition for Reargument	738a
Order	743a
Opinion of the Commonwealth Court, after Reargument (printed in the Appendix to the Petition for Certiorari at pages 51a through 54a)	744a
Petition for Allowance of Appeal	745a
Answer to Petition for Allowance	755a
Reply to Answer of the City of Pittsburgh to Petition for Allowance of Appeal	775a
Exhibit "A" attached to Reply, Opinion, Silvestri, J., in Public Parking Authority et al v. City of Pittsburgh, at No. 687 July Term, 1972	783a
Per Curiam Order of the Supreme Court of Pennsylvania	799a
Opinion of the Supreme Court of Pennsylvania (printed in the Appendix to the Petition for Certiorari at pages 1a through 49a	801a
Petition for Reargument, 7/12/73	802a
Answer to Petition for Reargument	812a

INDEX TO RECORD

Order of the Supreme Court of Pennsylvania (printed in the Appendix to Petition for Certiorari at page 50a) 821a

RELEVANT DOCKET ENTRIES

February 20, 1970	-	Complaint in Equity filed; returnable March 22, 1970.
February 24, 1970	-	Affidavit of Service filed.
March 5, 1970	-	Answer of defendant filed.
May 12, 1970	-	Issue granted, No. 74624.
June 29, 1970	-	Defendant's Interrogatories to plaintiffs filed.
July 24, 1970	-	Plaintiffs' Answers to Interrogatories filed.
August 3, 1970	-	Order filed.

Eo die, It is ordered and decreed that trial of the within captioned action, presently scheduled for Monday, August 3, 1970 be and the same hereby is continued to 15th day of September, 1970, at 9:30 o'clock A.M.

February 2, 1971	-	Transcript of proceedings filed.
March 3, 1971	-	Findings of Fact and Conclusions of Law filed.
March 19, 1971	-	Order filed.

Eo die, It is ordered, adjudged and decreed that the action in equity filed by the plaintiffs to enjoin the operation of Ordinance No. 704 of 1969, the Parking Tax Ordinance of the City of Pittsburgh, be and the same is hereby dismissed. It is further Ordered and Decreed that if no exceptions are filed hereto within twenty (20) days of notice of filing this adjudication, the decree nisi shall be entered by the Prothonotary upon praecipe as a final decree herein in accordance with Rule of Civil Procedure No. 1519(a).

April 5, 1971	-	Exceptions to Decree Nisi filed.
July 14, 1971	-	Order filed.

Eo die, It is further Ordered that the cost of this proceeding shall be borne by the plaintiffs and the decree nisi dated March 19, 1971, shall be entered as a final decree herein.

Docket Entries

August 10, 1971 - Certiorari from Commonwealth Court of the Matter of the appeal of Alco Parking Corp.; et al.

June 8, 1972 - Opinion and Dissenting Opinion of Commonwealth Court filed.

June 18, 1972 - Petition for Reargument filed.

June 29, 1972 - Order.

Now, June 29, 1972 it is hereby ordered that the above appeal be reargued and for this purpose shall be listed on the September argument list at Harrisburg on a date to be hereafter fixed and notice thereof given to the parties. Bowman, P.J.

August 11, 1972 - Order setting Monday, September 11, 1972, as date for reargument and further granting permission to appellants to file a Supplemental Brief, appellee to file a Supplemental Brief on or before September 8, 1972.

September 1, 1972 - Petition for Oral Argument made by Leonard M. Marks; Gold, Farrell & Marks, New York, N. Y.

October 10, 1972 - Opinion and Dissenting Opinion of the Commonwealth Court after reargument.

November 6, 1972 - Petition for Allowance of Appeal filed, Supreme Court of Pennsylvania.

November 14, 1972 - Answer to Petition for Allowance of Appeal filed, Supreme Court of Pennsylvania.

January 22, 1973 - Reply to Answer of the City of Pittsburgh to Petition for Allowance of Appeal

January 25, 1973 - Order of the Supreme Court of Pennsylvania:
Petition granted
Per Curiam

February 2, 1973 - Appeal from Commonwealth Court Order filed and docketed in Supreme Court of Pennsylvania and listed for argument on March 12, 1973.

February 15, 1973 - City of Pittsburgh's Motion to Quash Appeal filed.

February 21, 1973 - Answer of appellants to appellee's Motion to Quash Appeal filed.

February 26, 1973 - Petition for Oral Argument on behalf of Meyers Bros. Parking Central Corp. filed.

March 13, 1973 - Order of the Supreme Court entered.

And Now, March 13, 1973, the within petition of Leonard M. Marks, Esq., to appear and make oral argument on the side of appellants is hereby granted, the length thereof to be determined at the time of hearing. Per Curiam.

July 2, 1973 - Opinion and Dissenting Opinions of the Supreme Court.

July 12, 1973 - Petition for Reargument filed.

July 25, 1973 - Answer to Petition for Reargument filed.

August 10, 1973 - Order of the Supreme Court.

Denied Per Curiam
Mr. Justice Eagen dissents.

Complaint.

(Filed February 20, 1970.)

AND Now come the plaintiffs above named, by their attorneys, Leonard Boreman, Richard H. Martin and Baskin, Boreman, Sachs, Gondelman & Craig, and claim damages of the defendant above named, upon a cause of action whereof the following is a statement:

1. Plaintiffs are the owners and/or lessees of parking lots and parking garages situate in the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania, comprising a total of 19,886 parking spaces throughout the City of Pittsburgh.

2. Defendant, City of Pittsburgh, is a city of the Second Class, organized under the laws of the Commonwealth of Pennsylvania and is situate in Allegheny County.

3. On or about December 31, 1969, the defendant, City of Pittsburgh, by its duly elected City Council, pursuant to Act No. 511 of 1965, and its amendments, enacted Ordinance No. 704, Parking Tax Ordinance (hereinafter referred to as "Ordinance"), effective February 1, 1970, a copy of which is attached hereto, made part hereof and marked Exhibit "A".

4. By the provisions of the Ordinance, defendant imposed a tax upon all parking transactions of all operators engaged in the parking or storing of motor vehicles at non-residential parking facilities in the City of Pittsburgh, at the rate of twenty per cent (20%) per annum of the gross receipts from all such transactions during the year 1970, and thereafter from year to year.

5. Said Ordinance violates the Fourteenth Amendment to the Constitution of the United States and the Constitution and laws of the Commonwealth of Pennsylvania and is, therefore, illegal and invalid, as more particularly set forth in the following lettered paragraphs:

a). The Ordinance imposing a tax of twenty per cent (20%) per annum of the gross receipts of plaintiff parking operators is excessive and confiscatory, as it precludes said plaintiff parking operators from making a reasonable profit on parking transactions and, therefore, amounts to a taking of plaintiffs' property without due process of law.

b). The Ordinance imposing a tax of twenty per per cent (20%) per annum of the gross receipts of plaintiff parking operators, when added to the real estate tax on land and buildings and the six mill tax on their gross receipts pursuant to the Business Privilege Tax of the City of Pittsburgh, all of which are imposed by and must be paid annually to defendant, is excessive and confiscatory, as it precludes said plaintiff parking operators from making a reasonable profit on parking transactions and, therefore, amounts to a taking of plaintiffs' property without due process of law.

c). The Ordinance imposing a tax of twenty per cent (20%) per annum of the gross receipts of plaintiff parking operators works an unreasonable hardship upon said plaintiffs and is discriminatory when measured against the tax burdens of the City of Pittsburgh and the Public Parking Authority of the City of Pittsburgh since competing parking facilities

owned and operated by the Public Parking Authority of the City of Pittsburgh are exempt from all real estate taxes, and competing parking facilities owned and operated by the City of Pittsburgh are exempt from both the Business Privilege Tax and all real estate taxes, as well as the parking tax imposed by the Ordinance, while plaintiffs herein are required to pay substantial amounts of money to the City of Pittsburgh in the form of real estate taxes and the tax on gross receipts pursuant to the City of Pittsburgh Business Privilege Tax, in addition to the twenty per cent (20%) per annum tax on their gross receipts on parking transactions imposed by the Ordinance and are, therefore, denied the equal protection of the law.

d). 1). The Ordinance imposing a tax of twenty per cent (20%) per annum on the gross receipts of plaintiff parking operators is further discriminatory and a denial of the equal protection of the law since the Public Parking Authority of the City of Pittsburgh and other Public Authorities owning and operating parking facilities in the City of Pittsburgh are, under the Constitution of the Commonwealth of Pennsylvania and the law as determined by the Supreme Court of Pennsylvania, exempt from all taxes, including the tax

imposed by the Ordinance, while plaintiffs herein are made subject to the tax imposed by said Ordinance.

2). The exemption from all taxes of the Public Parking Authority of the City of Pittsburgh and other Public Authorities owning and operating parking facilities in the City of Pittsburgh, as aforesaid, renders the tax imposed by the Ordinance against plaintiffs herein, who do not operate parking lots or parking garages under leases from the Public Parking Authority of the City of Pittsburgh, invalid and illegal, under the Constitution of the Commonwealth of Pennsylvania and the law as established by the Supreme Court of Pennsylvania, since said tax lacks uniformity upon the same class of subjects.

e). The Ordinance imposing a tax of twenty per cent (20%) per annum of the gross receipts of plaintiff parking operators works an unreasonable hardship upon said plaintiffs and is discriminatory when measured against the tax burdens of other businesses located within the City of Pittsburgh, and as such denies plaintiffs equal protection of the law, since many other businesses, because of their relationship to traffic congestion and other characteristics, present problems requiring

municipal services and affect the public interests to the same degree and extent as non-residental parking facilities, but are, unlike plaintiffs herein, required only to pay real estate taxes and the Business Privilege Tax.

f.) The Ordinance imposing a tax of twenty per cent (20%) per annum of the gross receipts of plaintiff parking operators constitutes double taxation of the business of parking motor vehicles since the Business Privilege Tax and the Parking Tax Ordinance both are excise taxes imposed on the same gross receipts received by plaintiffs herein from the operation of their parking facilities.

6. The Ordinance imposing a tax of twenty per cent (20%) per annum upon gross receipts of transactions involved in parking motor vehicles at non-residential parking facilities will add to the already serious problem of traffic congestion and lack of adequate off-street parking facilities in the City of Pittsburgh since said tax makes the building of additional parking facilities by private owners and operators, such as plaintiffs herein, impossible because of an unwillingness on the part of lending institutions to commit funds to such projects and because of the impossibility of making a reasonable profit from the operation of said facilities, all of which is contrary to the public policy of the Commonwealth of Pennsylvania as established by the Parking Authority Law, the Act of 1947, June 5, P. L. 458; 53 P. S. 318 *et seq.*

7. The orderly operation, and in many instances the existence, of parking facilities in the City of Pittsburgh would be seriously and adversely affected by the application of City of Pittsburgh Ordinance No. 74 to plaintiffs herein.

8. Plaintiffs are without an adequate remedy at law.

9. Plaintiffs will suffer irreparable harm if the City of Pittsburgh Ordinance No. 74 is permitted to be enforced and applied against the plaintiffs herein.

WHEREFORE, plaintiffs, being without an adequate remedy at law and being in need of immediate relief, pray your Honorable Court for the following relief:

a). That the defendant be enjoined and restrained from enforcing the provisions of Ordinance No. 74, effective February 1, 1970, against the plaintiffs.

b). That the defendant be enjoined from attempting to subject plaintiffs herein to arrest and penalties, as well as civil suits, for the collection of any alleged tax liability.

c.) That the defendant be restrained from imposing a License Tax under the Ordinance for the parking facilities operated by plaintiffs.

d). That this Honorable Court order the refund of any taxes paid as a result of the enforcement of Ordinance No. 74, together with interest thereon.

c). That the Court grant such other and further relief as it deems just and proper.

LEONARD BOREMAN,
RICHARD H. MARTIN,
BASKIN, BOREMAN, SACHS,
GONDELMAN & CRAIG,
Attorneys for Plaintiffs.

Exhibit "A"

Ordinance No. 704 (printed in the Appendix to the Petition for Certiorari at pages 103a through 110a)

Answer of Defendant to Complaint in Equity.

(Filed March 5, 1970.)

And Now comes the defendant, by its undersigned counsel, and avers that it has a full, true, just and complete defense to the Complaint in Equity in the above-entitled case, which defense, insofar as it is required to be stated, is as follows:

1. The averments of Paragraph 1 are admitted in part and denied in part.

It is admitted that the plaintiffs are the owners and/or lessees of parking lots and parking garages situate in the City of Pittsburgh.

As to the averment that the lots owned and/or leased by the plaintiffs comprise a total of 19,886 parking spaces, defendant is without knowledge of the truth or falsity of the averment, the means of proof thereof being exclusively in the possession and control of the plaintiffs, and therefore denies the same and demands strict proof thereof at the time of trial.

2. The averments of Paragraph 2 are admitted.

3. The averments of Paragraph 3 are admitted.

4. The averments of Paragraph 4 are admitted.

5. The averments of Paragraph 5 state conclusions of law for which no answer is required.

6. After reasonable investigation, defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 6. Moreover, it is denied that any of the averments of Paragraph 6 are material to any of the issues in this case.

7. After reasonable investigation, defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 6. Moreover, it is denied that any of the averments

of Paragraph 7 are material to any of the issues in this case.

8. The averments of Paragraph 8 states a conclusion of law for which no answer is required.

9. It is denied that plaintiffs will suffer irreparable harm if the City of Pittsburgh Ordinance No. 74 is permitted to be enforced and applied against the plaintiffs herein. On the contrary, it is averred that all those receiving the benefit of municipal services must share the burden of supporting them. In any event, even if it is eventually held that the Parking Tax Ordinance is unenforceable, plaintiffs will have suffered no irreparable harm because any money paid will be refunded.

WHEREFORE, defendant avers that the Parking Tax Ordinance is a reasonable and necessary enactment under the authority of Act No. 511 of 1965, and requests that the prayers of the Complaint be denied, and that the Complaint be dismissed with the costs to the plaintiffs.

FREDERICK A. BOEHM,
First Assistant City Solicitor,

RALPH LYNCH, JR.,
City Solicitor,

Attorneys for Defendant.

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, personally appeared RALPH LYNCH, JR., who, being duly sworn according to law, deposes and says that he is the duly appointed City Solicitor for the City of Pittsburgh; that he has authority to execute the foregoing Answer of Defendant to Complaint in Equity and this Affidavit on its behalf, and that the averments set forth in said Answer are true and correct to the best of his knowledge and information or belief.

RALPH LYNCH, JR.

Sworn to and subscribed before me this 4 day of March, 1970.

AGNES L. McDONOUGH,
(SEAL) *Notary Public,*
Pittsburgh, Allegheny County, Pa.

My Commission expires September 22, 1973.

16a Transcript of Proceedings, 9/15/70

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

- - -

Alco Parking Corporation; Arena Parking, Inc.; Campus Parking, Inc.; Fourth Avenue Parking, Inc.; Grant Parking, Inc.; Harry Sheppard, Jr., t/a Stanwix Auto Park; John Cominos, t/a Liberty Parking; John Stabile and Rocco A. Del Sardo, t/a William Penn Parking Lot; K-Seven Parking Company; Meyers Brothers Parking-Central Corp.; Parking Service Corporation, Inc.; William Penn Parking Garage, Inc.,	)	No. 1699 April Term, 1970
Plaintiffs,	)	In Equity
vs.	)	
City of Pittsburgh,	)	
Defendant.	)	

- - -

TRANSCRIPT OF PROCEEDINGS

BEFORE: Hon. Arthur Wessel, Jr., J.

- - -

September 15, 1970
September 16, 1970
September 17, 1970

- - -

APPEARANCES

- - -

LEONARD BOREMAN, Esq., and RICHARD H. MARTIN, Esq., of the firm of Baskin, Boreman, Sachs, Gondelman and Craig, 1018 Frick Building, Pittsburgh, Pennsylvania, 15219, appearing on behalf of the Plaintiffs.

LEONARD M. MARKS, Esq., of the firm of Steel, Cohen, Gold, Farrell and Marks, 745 Fifth Avenue, New York, New York, 10022, appearing on behalf of Meyers Brothers Parking.

FREDERICK A. BOEHM, Esq., and GRACE S. HARRIS, Esq., appearing on behalf of the City of Pittsburgh.

- - -

SEPTEMBER 15, 1970
Tuesday Morning Session.

- - -

HARRY W. SHEPARD, JR., called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BOREMAN:

Q State your name.

A Harry W. Shepard, Jr.

Q Where do you live, Mr. Shepard?

A 670 Valley View Road, Mt. Lebanon, Pennsylvania.

Q What is your occupation?

A I own and operate parking facilities.

Q Under what name?

A Stanwix Auto Park, Stanwix Parking.

Q This is in the City of Pittsburgh?

A It is in the City of Pittsburgh.

MR. BOEHM: Wasn't there another one?

THE WITNESS: Stanwix Parking, Incorporated, which is an owner of parking facilities.

BY MR. BOREMAN:

Q Stanwix Auto Park is individually owned as an individual proprietorship by you?

By me.

What other activities in the City of Pittsburgh do you engage in with relation to parking?

We also manage parking facilities for Horne's Garage, for Gimbels. We lease a facility on Fourth Avenue.

Just a moment. When you say "we," do you mean you individually or your corporation?

I'm using the collective term for my company. It means Stanwix Auto Park as an operator-manager.

Go on.

On Forbes Avenue we also operate another parking facility and on Fort Pitt Boulevard.

Are these parking lots or parking garages?

Fort Pitt Boulevard, Fourth Avenue, Forbes Avenue are parking lots. The others are all garages.

When you said you operate a parking facility for Horne's and Gimbels, will you explain what that is?

Horne's has leased a parking facility from the Parking Authority. We are operator-managers of that garage. It's a management contract or a lease. The same is true of Gimbels. Gimbels leases a garage from the Parking Authority; we manage it for them. We provide the personnel, pay the help, take care of the place.

And your compensation so far as the Horne's and Gimbels

operation is as a management fee?

A Yes.

Q Horne's is the lessee of the Parking Authority and Gimbels is the lessee of the Parking Authority?

A That's correct.

THE COURT: What was that other parking authority that you mentioned?

THE WITNESS: Horne's and Gimbels.

THE COURT: There was Forbes Avenue, Fourth Avenue; and what was the other one?

THE WITNESS: Fort Pitt Boulevard. These are parking lots.

BY MR. BOREMAN:

Q These do not belong to the Parking Authority, these are your own lots that you operate?

A These are ones that I have under lease.

Q And operate?

A And operate.

Q Is there any facility in which you own the land and building which contains a parking facility?

A Yes, sir, as a stockholder of Stanwix Parking, Incorporated, that owns a parking garage directly across the street from Horne's. I am the majority stockholder in that corporation, and Stanwix Auto Park as the management company operates

that facility for the corporation.

How long have you been in the parking business, Mr. Shepard?

Oh, I was in the parking business with my father alongabout 1937, '38, since I was about 17 years old. And aside from war service, why, continuously in that business.

What activities have you engaged in in connection with the parking industry?

Oh, I have been for 14 years a director of the National Parking Association and was President of it for two terms. This is an association of largely private parking operators, about 4,000 parking operations.

Throughout the United States?

Throughout the United States and also in European countries. We have members in Japan, Mexico and in Europe.

You were President of that association for two years?

Yes, sir.

What years?

They were 1954 and 1955.

Do you operate any parking facilities outside of the City of Pittsburgh?

Yes, sir.

What are they?

I operate in Tucson, Arizona and Tallahassee, Florida.

Have you appeared at any meetings or panels or educational

symposiums of parking people?

A Oh, yes, sir. I have been frequently called upon to make speeches before Chambers of Commerce. I am a member of the Transportation Committee of the United States Chamber of Commerce, member of the subcommittee on policy which concerns itself with highway use and parking, among other things. I've appeared before the Oklahoma City Chamber of Commerce, the Seattle Board of Trade, the Metropolitan Board of Trade in Washington, D. C. I will appear on a panel in Baltimore later in this month.

Q Now, in the course of the preparation of this case did I call upon you to furnish your books and records disclosing the employees' revenue and operating expenses of the parking operations in Pittsburgh that you operate?

A Yes, you did.

Q And did you furnish them?

A I furnished these records taken directly from our books by our accountant who happens to be a C.P.A.

Q To whom did you furnish them?

A To Mr. Buzzard.

Q Who is he?

A Mr. Buzzard is a research expert, to my knowledge. He compiles this sort of information. He works for Mr. McNeil who is a recognized parking and traffic consultant.

And the figures that you furnished him were taken from your books and records, and you are familiar with the compilations made for the purpose of this case, are you not?

Yes, sir.

Would you say that the figures in that compilation are true and correct?

I would say so.

And taken from your books?

Yes, sir. They were taken directly from our books.

From audited statements of your books?

We do not perform an audit, as such; but our accountant is fully qualified as an auditor.

Now, Mr. Shepard, as an operator of parking facilities in the City of Pittsburgh, will you tell us in what way these parking facilities affect congestion, traffic problems, in the downtown area?

They certainly relieve congestion. As a matter of fact, the whole concept of a parking operation is to relieve congestion. Shopping centers, department stores, all major facilities need parking today to stop people from crowding the streets in front of them. The lack of parking, the lack of getting -- the lack of parking leaves cars on the street. A parking garage takes them off the streets. Congestion in the City of Pittsburgh would be terrible if they did not

have the parking facilities we have today. It's pretty bad now because we don't have enough. And Wilbur Smith made a recent study for the Parking Authority to prove we don't have enough.

MR. BOEHM: I object to this testimony, Your Honor. This is hearsay as to what Wilbur Smith's study showed.

THE COURT: We will sustain your objection with respect to that last phrase and strike that from the record as being hearsay.

(EXCEPTION NOTED)

BY MR. BOREMAN:

Q Tell us, Mr. Shepard, how about in the operation of your parking facilities downtown such as your Stanwix Auto Park Garage and Horne's and Gimbels, does the operation of those garages clog up the streets?

A No, sir, the operation does not. They are specifically designed to prevent that. As a matter of fact, even a bad operation takes cars off the streets because nobody goes anywhere to park. They come downtown to do something else entirely. They come to shop at Horne's, and if they come to shop at Horne's and there's no place to park you have congestion. If they come to the City-County Building to attend a court case and there is no place to park, they are

in the street and it creates congestion.

How about in high peak periods such as the morning when people are all pouring into town to their offices or at night when they go out; does the ingress and egress to and from the parking garages cause congestion?

Not at all. It relieves it. At that time the situation is even more as I described. The heavier the traffic on the street, the more you need places for the cars to go. This is the reason why in suburban shopping centers they build acres and acres of parking.

As an operator in downtown Pittsburgh have you asked for and received additional police protection or other services?

I haven't asked for it because we haven't needed it. I've noticed a particular lack of it in traffic control lately, however.

What do you mean by the lack of it?

Well, it seems to me we used to have a lot of policemen in town and now we have substantially fewer.

Is there a policeman stationed in front of any of your garages for the specific purpose of regulating traffic in your garage?

No, sir. There is a policeman stationed at either end of a block nearby, nothing to do with the garage. We have no lines in the street. If we did it would still be a matter

of taking people off the street, they would still be on the streets if we didn't have the garage.

Q But you don't have any lines?

A We do not have any lines, no, sir.

Q By the way, Mr. Shepard, talking before about your qualifications, I think you are actually a member of a parking authority, are you not?

A I'm a member of the Mt. Lebanon Parking Authority, yes, sir.

Q What does that do?

A The Mt. Lebanon Parking Authority built two garages.

MR. BOEHM: I object to this testimony, Your Honor. I don't see how it can be relevant to this case.

MR. BOREMAN: I want to show that this man is a highly experienced competent parking operator who is extremely familiar with the whole parking industry and traffic situations in this area.

MR. BOEHM: I have no objection to that.

MR. BOREMAN: I want to show that he is not only familiar in his own business and in all the panels and all the offices he has held, but even Mt. Lebanon has put him on the Authority, and I am going to ask him why.

MR. BOEHM: The only objection I have is to

his testifying as to what Mt. Lebanon has done in the way of building parking garages. I don't see how that could affect the problem in the City of Pittsburgh.

THE COURT: For the purpose of which counsel has suggested to you to qualify the witness, we will permit that testimony.

MR. BOREMAN: I want to say also that I think the purpose of why Mt. Lebanon or any other municipality built garages is relevant here. Our point is to show you have these garages to take away the congestion and relieve the situation.

THE COURT: We will confine that to the City because it is the City Ordinance that is involved as distinguished from outlying districts.

MR. BOREMAN: Will you read the question?

THE REPORTER: (Reading) "Question: By the way, Mr. Shepard, talking before about your qualifications, I think you are actually a member of a parking authority, are you not?

"Answer: I'm a member of the Mt. Lebanon Parking Authority, yes, sir.

"Question: What does that do?

"Answer: The Mt. Lebanon Parking Authority

built two garages."

MR. BOREMAN: I think we can leave it there.

THE WITNESS: The Mt. Lebanon Parking Authority

MR. BOEHM: Excuse me, Your Honor. He has to ask a question first and then get the answer rather than having the witness volunteering information.

BY MR. BOREMAN:

Q What are the responsibilities of the Mt. Lebanon Parking Authority?

A To manage and operate parking facilities, to create new facilities as the occasion demands. The Authority was created to relieve traffic congestion and to protect the tax base in the area. If there were no places to park, people would not come to the area and as a consequence it would decline in value. This is one of the few parking authorities who have acting parking operators on it, and I serve not because I feel that a parking authority is the proper way to do it, I would rather see private enterprise do it, but I serve because I think it's the responsibility of a citizen to provide expert management where he can in his locality.

(Plaintiffs' Exhibit No. 1 was marked for the purpose of identification.)

MR. BOREMAN:

I show you what has been marked for identification as Plaintiffs' Exhibit 1 and ask you to state what that exhibit is.

This is data pertaining to the parking operations of the Plaintiffs in the Pittsburgh Parking tax case.

Now, in Exhibit 1 is a tab marked Stanwix Auto Park, and I show you that tab and ask you what Stanwix Auto Park and the data following that tab mark is. What is it?

Stanwix Auto Park is the company which I own, and the data which appears in here has been extracted from our books as being the correct operating figures of our various facilities

Have you examined the data in this book with respect to your company, Stanwix Auto Park?

Yes, sir, I have.

Are the figures contained therein taken from your books and records?

They are taken from my books and records.

Are the figures contained therein true and correct as shown by your books and records?

Yes, sir.

Now, Mr. Shepard, it has been said that the parking tax which is involved in this case has really no effect on the profitability of your business because it can be passed onto

the customer.

A That's ridiculous.

Q Will you tell us about that? Can it be passed onto your customers?

A No, sir, it cannot be passed onto our customers. That statement has been made many times and it's an absolute fallacy. The only place that this money can come from is out of the operating profits of the corporation, if they happen to exist. You cannot pass it on. A parking rate is determined by the usage in the area and the demand in that area, and just because the City passes an ordinance raising the parking tax doesn't mean you automatically raise the rate. That would be silly. Why wouldn't you get that rate before?

Q What do you mean by that?

A Well, if you could get a dollar for parking, you don't need the City to tell you to raise it from 75 cents to a dollar. If you can get a dollar for it you should get it. If it's a fringe parking area there are only certain prices people pay in a fringe parking area. If it's a downtown turnover location, you can drive customers away by raising the rates. We have adjusted the rates, but we haven't done it because of the tax. We've adjusted it because of the business situation that existed.

When the parking tax was first introduced in 1963 and made 10 per cent, did you increase your rates to meet that 10 per cent tax?

We did not increase them to meet the 10 per cent tax.

What did you do?

We adjusted some rates. We did not adjust them all upward. We adjusted some downward. We had to adjust the rates at that time to confine the operations, say, at the Stanwix Garage, this is a good example, so that we would provide parking for shoppers.

And don't forget, when you provide parking for shoppers, they can park free, they don't pay for it out in the shopping center. Now, if we charged a dollar for the first hour at that time it would have been ridiculous. You couldn't have gotten a person to come into the garage. Now we charge 75 cents.

You are both a private operator and an operator for lessees of parking authority garages, are you not?

Yes, sir.

So you are familiar with both operations?

Yes, sir.

Except for the rates that are charged by either place, is there any difference in a parking authority operation and a private operator operation?

A As far as the purposes are concerned, no.

Q I mean in parking cars is there any difference?

A No, there's no difference.

Q The operation is the same, it performs the same function, doesn't it?

A Yes, sir.

Q You are familiar with the rates that you charge in parking authority garages such as Horne's and Gimbels, and you are familiar with the rates that you charge as a private operator

A Yes,sir.

Q Is there any difference?

A Yes, there is a difference. Again, it's purely because of the business situation.

Q Which is higher, your rates or the Parking Authority?

A My rates are higher.

Q Can you tell us how much higher?

A It could be as high as, for an all day parker, a dollar.

Q A dollar higher?

A Yes, sir.

Q How about a one-hour parker?

A It could be 40 to 45 cents higher for a one-hour parker.

Q In terms of percentage, what would that be?

A The average check is nothing like that. This is where you get confused about rates. We have our rates geared to

provide for parking for as many customers as we can possibly use in the facility. In other words, we are providing for the short-term parker.

The Authority rates, since they don't pay any real estate taxes, have been kept low; and as a matter of fact, they have been filling up most of the day, completely contrary to what their original purpose was.

You mean you have all-day parkers?

They get many all-day parkers. Recently Gimbels' garage, the Parking Authority raised the all-day rate and as a consequence flushed out some of the all-day parkers.

Nothing to do with the parking tax, it was just because the purpose of the building was prostituted to an all-day parker.

In other words, Gimbels and Horne's and Kaufmann's want short-term parkers, not all-day parkers?

Why, certainly. They are geared for that, those cars or people that come in and shop in the store; and the all-day customer keeps them out. We call them roosters in the trade.

In view of the difference in rates between the Parking Authority garages and your garages, will you tell us, is it feasible for you to raise your rates now to meet this tax?

I cannot raise the rates now. If I could raise the rates to meet this tax that's been in effect since February, I would have. I do not feel that I would accomplish anything

but drive my customers away if I raise my rates at this time.

Q What experience do you have to tell us whether or not raising rates to a great degree as might be required by this parking tax would drive customers away?

A I've been in this business for 33 years. I can't take the chance on driving them away. I have a feeling for this business, I know the business, I've been consulted as an expert in this business. There is only so much money you can charge. I have a Parking Authority garage on the other side of Horne's Department Store that competes directly with me, doesn't pay any real estate taxes. If I drive my customers away I'm in double trouble.

Q So, Mr. Shepard, what is your opinion as to whether this parking tax can be passed on?

A The parking tax can never be passed on. That is silly. You are charging the rate that you think is the best one for you right at that time. If you raise that rate you either drive customers away or you change the character of the business. And there's been no evidence at all that there's -- all you have to do is pass an ordinance to raise parking rates. We have competition from all of the shopping centers around here. I think these taxes and the high cost of parking in the City are driving people out of the City. I think that's evident. All you have to do is look at the

census figures and you can see what is happening to the City. Look at its tax base. This is part and parcel of it.

Mr. Shepard, I am going to show you what has been marked Exhibit 1, and I am showing you the portion that you have identified as the figures taken from your books and records.

Now, would you with respect to the Stanwix Garage -- and I think that is the one that you own individually, is that right?

Yes, sir.

Where is that located?

Corner of Fort Duquesne Boulevard and Stanwix Street directly across the street from Horne's Department Store.

With respect to Stanwix Garage, what does that show as to the trend of your profit for the years 1968-1969, and what is the projection for 1970?

MR. BOEHM: Excuse me. I would like to place an objection on the record, Your Honor, to this testimony in that it violates the best evidence rule. It's hearsay. That is a compilation of figures that was taken from his original records. The original records are the best evidence, and, therefore they must be produced in this court in order to be admissible.

THE COURT: The witness has testified that he

knows his own records and that those figures were taken from those records and that they are accurate. We will put it this way, however, should counsel for the Defendant desire those records for the purpose of his case, we will direct that they be presented; but in the meantime, the Court will hear the testimony with respect to what records or copies of records have been presented here in court in the form of this particular exhibit.

MR. BOEHM: I would like to make that request right now, Your Honor.

THE COURT: Very well.

MR. BOREMAN: Before we go any further, is counsel asking us that we bring all our books and records into this courtroom? I would say that this is a tremendous imposition. We will make available to counsel -- he can, he or any of his office staff come to the place of business and examine all the books and records we have thoroughly. I think for us to bring the books and records into this courtroom is quite an imposition.

MR. BOEHM: All I am interested in seeing, Your Honor, is what must be available, a financial statement for the years that he is talking about.

that is all I need, the kind of financial statement that his accountant mails to the firm every year showing what his financial position is.

MR. BOREMAN: We will be glad to make available to counsel or any of his staff and we will furnish our people to work with him and give them every bit of books and records we have, and then he can question whether it is accurate or correct or not.

I might say this, Your Honor, you take Alco Parking Corporation, as you will see from that book there are about, I think, ten facilities in there; and the accountant who makes up the statement doesn't make a separate statement for each individual lot. He makes a corporate statement, and it was necessary for Mr. Buzzard together with the controller to sit down and glean out the revenue from that one lot which they have on their books and records but doesn't appear as an individual item on the statement. And to allocate matters like insurance where a policy covers maybe ten or twenty or thirty or forty lots, to allocate insurance to that and pension payments based on wages allocating it and office rent, there are various allocations where Mr. Buzzard is going to explain how he did it. He has a right --

THE COURT: To cut this short, as we said before, we will give counsel the opportunity to examine or copy or have copied whatever records he feels are appropriate for the purpose of your side of the case. We are going to put the burden on you to decide what you want.

MR. BOEHM: That is what I am trying to tell him, Judge. Suppose that Mr. Shepard has an accountant which gives him a financial statement at the end of the year, which doesn't necessarily, as Mr. Boreman has explained, segregate the figures with respect to each individual operation --

Is that right, it doesn't segregate your figures with respect to each of your garages?

THE WITNESS: No, our financial statement includes all the operations in Florida and Arizona and everywhere else, also certain other businesses that are connected with the company that are not directly involved in parking. I would be glad to supply you that.

MR. BOEHM: Your accountant doesn't give you any figures with respect to your operations, say, in the City of Pittsburgh alone?

THE WITNESS: Oh, yes, sir, we have a day-by-day report which you are perfectly welcome to see,

if you wish. Our tax auditor sees them all the time, and they will come out to the same numbers you have (indicating) here.

MR. BOEHM: For each garage in the City?

THE WITNESS: Yes, sir.

MR. BOEHM: That is what I would like to see.

THE WITNESS: We have voluminous records. You would be looking at a file full.

MR. BOEHM: Do these reports conclude what your profits are, for example, from the garages in the City of Pittsburgh?

THE WITNESS: Each report would not. Each report is the business done in that particular operation. You could by looking at those reports determine what the profit was or the loss was, but you would have to compile them exactly the way you have (indicating) here. You would be going through exactly the same thing that Mr. Buzzard did.

MR. BOREMAN: Your Honor, when he asks for statements or financial statements, they are hearsay as much as that (indicating) would be. Statements are what an auditor said the books show. That is exactly what we are showing. Mr. Buzzard is going to say that is what the books showed. He is free to

go down and look through our books and records. He is going to have to go through weeks of compilation which Mr. Buzzard did. That is why this is the simplest way.

THE COURT: As we said before, Counselor, it is up to Mr. Boehm to decide what he wants and what he wants to examine, and it is up to him to carry the ball from here on out.

MR. BOREMAN: Your Honor, I would like you to have with counsel's permission a copy of this book so that you can follow this testimony.

First I will offer in evidence what has been identified as Plaintiffs' Exhibit 1 --

MR. BOEHM: I don't think a proper foundation is laid at this time unless he puts Mr. Buzzard on the stand. He compiled the report.

THE COURT: Let us get this settled one way or another. If you want to withdraw this witness and call another witness to properly authenticate that instrument, fine.

MR. BOREMAN: Will you step down temporarily, Mr. Shepard?

THE COURT: We will withhold our ruling on Mr. Boehm's objection pending the disposition of

the testimony insofar as the record is concerned. If you want to proceed at this time with this witness for the purpose that you have in mind, you may do so.

(Plaintiffs' Exhibit No. 2 was marked for the purpose of identification.)

- - -

JOHN S. BUZZARD, called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. BOREMAN:

State your name, please.

John S. Buzzard.

Where do you live?

401 Neulon Drive, Mt. Lebanon Township, Pittsburgh, Pa. 15216

What is your occupation?

My present occupation, I'm employed by Donald M. McNeil, consulting engineer.

In what capacity are you employed?

I'm a planning supervisor having to do principally with the analysis and compilation of statistical material concerning parking, urban renewal projects, the great high school project and various other projects of similar nature.

Q How long have you worked with Mr. NcNeil?

A I've been with Mr. McNeil since September, 1968.

Q Prior to that period will you give us your educational and business background?

A I'm an electrical engineer graduate of Carnegie Institute of Technology in the class of 1925. I was employed by the Pittsburgh Railways Company from 1925 to the time it was taken over by the Port Authority in 1966. In my employment with the Pittsburgh Railways Company I held a number of positions in the engineering and supervisory capacity in the maintenance and construction of electrical equipment. I also entered the operating field and held several positions in the traffic and transportation department. And in 1950 I became General Superintendent of Traffic and Transportation which was the largest single department in the Pittsburgh Railways Company having charge of all of the transit operations of the system.

And when the Port Authority took over the operations of the railways, I was retained as General Superintendent wherein I had approximately the same functions and responsibilities as I had with the railways company. And on January 1, 1966 I was made Operating Manager for the Port Authority which position I held until the time I retired in May, 1965 -- in 1968 having attained the age of 65 at which

time retirement is required.

In the course of your work with Pittsburgh Railways Company and the Transit Authority, did you engage in any statistical studies in the preparation of statistical studies and analyses?

Yes, to a very considerable extent. Besides my duties and responsibilities insofar as the overseeing and planning of the work of others, I had the responsibility for the preparation of the provisional and departmental annual operating budget projections broken down by month, I had the responsibility for the preparation of the maintenance of statistical records to indicate the extent to which the budget projections were being adhered to, and -- as head of the Transportation Department I did a continual study of maintenance, not only for the purpose of maintaining a high degree of regularity, but to determine the causes of schedule breakdowns. Recurrent traffic congestion and delays were matters of great concern and required a great amount of attention and statistical compilation. In this connection a constant and close liaison between the City's Bureau of Police and Bureau of Traffic Planning was maintained. All practical methods were used to eliminate and minimize the causes of recurrent delay.

During my employment with both the Railways Company and

PAT I participated in all wage contract negotiations between management and union representing the operating employees. In this connection I personally prepared or supervised the preparation of numerous statistical analyses of the cost of the proposed changes in the wage contract. In most of those instances where the wage contract negotiations became stalemated and resulted in a wage arbitration, I was either a principal witness for the arbitration board in presenting testimony and statistical exhibits, proposed changes in the wages and working conditions, or I had the responsibility for the preparation of such exhibits and testimony.

Over the past 30 years, I've been a management member for both the Railways Company and PAT on a number of arbitration boards established to decide discipline cases or cases relative to the application or interpretation of the contract.

Q Stick to your experience with respect to statistical data, analysis and preparation.

Did you ever testify before any official boards with respect to statistical data for the Pittsburgh Railways Company?

A 1958 I was a principal witness before the Public Utility Commission in a service complaint and presented and gave extensive voluminous testimony and had prepared exhibits

concerning schedules and the scheduled maintenance of every route of the Pittsburgh Railways system and to the degree with which those schedules were maintained. I have also given testimony before the Public Utility Commission in a number of other more minor --

MR. BOEHM: I didn't hear the last thing you said.

THE WITNESS: I said more minor affairs.

MR. BOEHM: Could you read back the last couple of sentences, please?

(The last answer was read.)

MR. BOREMAN:

Mr. Buzzard, I show you what has been identified as Plaintiffs' Exhibit 1 and ask you what it is.

Well, this is a book which contains the compilation of the operating revenues and the details of the operating expenses of each individual parking facility operated by the several Plaintiffs involved in this case.

Who prepared the book?

I prepared the book under the direction and supervision of Mr. McNeil, my employer, and with the -- that information being furnished by the accountants of the several Plaintiff companies, individuals or partnerships.

Tell us how you went about preparing that book, who you

consulted and what records you looked at.

A Well, with reference to Mr. Stabile's operations, I consulted with his --

Q Just a minute. When you say Mr. Stabile's operations, you mean the Plaintiffs'. Designate what operations they are.

A They are the Alco Parking, William Penn Parking Lot, Parking Service Corporation, Arena Parking, Fourth Avenue Parking, William Penn Parking Garage and Campus Parking.

In reference to those I spent considerable time in Mr. Stabile's general office working with his accountant in obtaining from their books and records the various data from which we construct the individual statements for the individual parking facility, whether it be a lot or a garage.

Now, for instance, in the case of the Alco Parking Corporation, that has some ten or eleven different individual facilities. They keep their books on a consolidated basis. It was necessary for us, when I say "us," I mean his accountant and myself, to go over their ledgers and break out the operating expenses which they have maintained individually for each lot, such as wages and parking tax, revenue and such things as they charge individually to each lot.

Q First, how did you get the revenue on each lot? Was there

a separate statement for each lot?

Separate ledgers. They maintained a separate ledger for revenue for each lot.

That is where you got the revenue figure?

That's right. They maintain a separate ledger for the wages and salaries for each lot.

Now, when it comes to such items as general office rent, pension fund expense, general insurance, which the corporation pays a blanket amount for, it was necessary for the accountant to go back and allocate a certain percentage of that lump sum to each one of these facilities because it is a part of the cost.

And you worked with him in making that?

I worked with him in doing that. Now, the -- for instance, the pension fund expense was allocated on the basis of the payroll, whatever the percentage of payroll for the individual lot was, the total payroll of the company, that percentage was applied to the overall pension fund expense.

Which items did not require allocation? Which were the fixed items that did not require any allocation among lots?

Well, if you look at one of these individual statements, parking tax did not require any allocation, payroll, rent did not require it, wages and salaries, group insurance did, pension expense did, general insurance did, maintenance and

supplies did not, uninsured losses did not, utilities and telephones did not.

Now, those various items constitute a very small --

Q Which various items?

A The ones that I said needed to be allocated such as group insurance, pension expense, general insurance and maintenance and supplies. Materials and supplies required some allocation. They as a total represent a very small percentage of the total operating expense and the variation in the method of allocation would not alter the overall figure.

Q So that insofar as the major items are concerned such as revenue, the amount of the parking tax, wages and salaries and rent, you got those directly from the ledger pages?

A That is right.

Q And they didn't require allocation?

A They did not.

Q And the minor items which required allocation were done on a basis that both you and the accountant considered logical?

A That's correct.

Q Now, Mr. Buzzard, in your opinion from your work is Exhibit I an accurate and correct reflection of what is on the books and records of these companies?

A It certainly is.

MR. BOEHM: I object. Your Honor, I would like

to at this point cross-examine Mr. Buzzard on his qualifications before he testifies with respect to this.

THE COURT: Very well.

- - -

VOIR DIRE EXAMINATION

MR. BOEHM:

Mr. Buzzard, you have said that you graduated from Carnegie Tech which is now C. M. U. with a degree in electrical engineering, is that right?

Yes, sir.

Do you have any degrees at all in the field of accounting?

No, sir.

Do you have any degrees at all in the field of economics?

No, sir, although the engineering course at Carnegie Tech at the time that I was there included a one-year course in economics and a one-year course in business law.

In business law, did you say?

Business law and a six-month course in statistics.

So that your educational background with respect to accounting is limited to a one-year course which you took at Carnegie Tech, is that right?

MR. BOREMAN: Excuse me, Your Honor. I am going to object to any further questions on the

qualifying. I am not presenting Mr. Buzzard as an expert witness. I am not going to ask his opinion. All we are presenting him for is to show he compiled that from the books and records which he testified he did. The issue is whether or not this document is a fair reflection of what is on the books and records. And all I gave his background for was to show that he did have statistical experience and wasn't just coming in not knowing about statistics.

THE COURT: The fact that you brought that very point out to show his capacity to make such a report and make such an analysis qualifies counsel's position here on a voir dire to explore that background a little further. Accordingly, we are overruling your objection and counsel will proceed.

(EXCEPTION NOTED)

MR. BOREMAN: I want it clear, Your Honor, that I didn't put him on for the purpose of an expert.

MR. BOEHM: I think the last question counsel asked, Your Honor, was with respect to an opinion, and there was testimony introduced that certain allocations were made in what was considered to be a logical manner.

MR. BOREMAN: He also testified it was a minor part --

THE COURT: Counsel, we have already ruled on this. We have overruled your objection. Now, let us get on with this.

MR. BOEHM:

The last question I asked was, I think, Mr. Buzzard, your educational background with respect to accounting is limited to a one-year course which you took at Carnegie Tech, is that correct?

My educational background, yes. But my experience --

That is all I asked you, sir.

And that was a course in principles of accounting, I suppose?

Yes, sir.

Have you ever been in business, sir, as an accountant?

No, sir.

Have you ever made an audit of anyone's books in return for which you received compensation?

No, sir.

When you were testifying before the Public Utility Commission with respect to rates, at that time you were an employee of the Pittsburgh Railways Company, is that right?

That's right.

Q You were not testifying there as an independent expert, you were testifying as an employee of the Railways Company?

A That's right.

Q In compiling this report did you discuss the figures that went into the preparation of the report with anyone?

A Well, I discussed them with -- at considerable length with not only the accountant, in this case of Alco and the related companies, but I discussed them at considerable length with Mr. McNeil as to how my -- how I was progressing in the process of the work.

Q But you prepared the report yourself, is that right?

A That's right.

Q And when you came to the point of inserting a figure in one of the columns containing that report, that figure was arrived at as a result of your own studies, is that right?

A That is right.

Q And when you made a decision with respect to allocation, as you say in a logical manner, that was your independent decision, is that right?

A No, sir. No, sir. I testified that that was done by the accountant, and in those cases where it was not necessary for me to deal with the accountant of the Plaintiff company I took their -- the figures that they submitted to me exactly. I made no allocation, no alteration, no change

whatsoever in their figures.

Then, were there certain areas of this report in which you felt personally incompetent to set out without first consulting the accountant that represented one of these companies?

I wouldn't put it that I was incompetent but I wanted their -- to do the allocating in the way that would conform to their methods of accounting, good accounting practice.

When you went to them, I suppose you had a certain decision to make, for example whether these allocations were going to be made in a certain manner or not, that is why you consulted the accountant?

Not entirely.

For example, what kind of a matter would you consult the accountant on?

In the first place, I consulted the accountant first to get the whole body of information, I got that from the accountant. Then, when it came to how to treat these unallocated items in their consolidated statement, then he decided as to how the allocation would be made.

The accountant did that?

He and I worked out the allocation mathematically.

How many different accountants did you talk to to help you make these decisions?

A Oh, only one.

MR. BOREMAN: I object, Your Honor, to the word "decisions." He didn't make decisions. He recorded what the accountant gave him as his decisions, the accountant's.

MR. BOEHM: I think his testimony will speak for itself.

MR. BOREMAN: Let us get the testimony straight.

MR. BOEHM: Would you repeat the last question, please?

THE WITNESS: I answered one. There was two.

BY MR. BOEHM:

Q The last question was, how many different accountants did you consult. You said one, and now you would like to change that to two?

A Right.

Q Who were they?

A Mr. Thomas Cassidy, who was the accountant for the -- for Mr. Stabile's firms, and Mr. Samuel Robinson who is a C.P.A. for the firm of -- the name escapes me now, but he does the accounting for the Liberty Parking.

THE COURT: That is one of the Plaintiffs in the case?

THE WITNESS: Yes.

MR. BOEHM:

Other than that, this report is your own personal report?

MR. BOREMAN: That is objected to, Your Honor.

THE WITNESS: No, no, it is not my personal report. I compiled the figures from the information that was supplied to me by the Plaintiff company.

MR. BOEHM:

I understand that. What I am talking about, other than that - I put it together.

Other than that, you yourself arrived at the figures that are inserted in those columns?

I put it together, yes, sir.

MR. BOEHM: Your Honor, I object to the use of this exhibit. I also object to the qualifications of this man who is actually testifying as an expert. He is testifying as an accountant. What he has done is examined the books, apparently, of these various corporations and he has made allocations, he has made decisions on figures that are being inserted in these various columns. That was a job for an accountant. It is not a job for an electrical engineer or an arbitrator on behalf of the Pittsburgh Railways or the Port Authority, or somebody. If this were a simple matter of merely producing the

statements for the various companies, then, as I said before, the best way of introducing this kind of evidence would be to bring in the owner of the company with the material, have him take the stand and testify that these are the figures. For some reason, counsel for the Plaintiffs thought it necessary to obtain the services of Mr. Buzzard to compile all these reports into one book and have him present them instead of having them presented by each owner. The reason for that is, I think we can all assume, there were certain conclusions made there and Mr. Buzzard is put on the stand in order to defend those as some kind of an expert which I don't think he is qualified to do.

MR. BOREMAN: This is a complete misstatement -

THE COURT: With respect to your position, Counselor, we disagree with you that Mr. Buzzard is not capable or qualified to do what he has done in this particular set of circumstances. Not only through his college training, his background as an engineer, but primarily and basically his experience in this matter of traffic manipulation and consultation and involvement has given him, as we see it, a proper background to compile such a report as he

has compiled for the purpose of facilitating matters in the trial of this case in which there are many parking authorities -- or, rather, parking organizations involved. As we see it, the breakdown of the various expenses and income, et cetera, et cetera, et cetera, is much better handled through a unification and through the testimony of one qualified expert as distinguished from having all of these individual companies come into court and present a breakdown of all of their particular statistics. I think basically this was done to facilitate matters. And I think that the material that is in there and the way that it was procured is appropriate, it is relevant and it is admissible.

As the Court pointed out before, counsel has every right to demand such other exhibits as it may see fit to properly present its case to the Court. By the same token, the Court has every right to have presented to it a simplified, uncomplicated, unmixed up class of exhibits, because you are asking the Court to make a very serious and involved decision on a set of circumstances that is highly technical and highly involved.

For that reason, we overrule your objection.

(EXCEPTION NOTED)

MR. BOEHM: Your Honor, that actually is the basis of my objection because this man has unmixed those highly complicated figures without an appropriate background. But I recognize the Court's ruling.

I would like to make a further objection to the use of this on the basis of the fact that it constitutes hearsay because, according to the witness's own admission, part of it was compiled after consultation at the direction of other accountants and other parties, so that I think this man cannot really offer this in evidence since it is, at least in part, based on the information supplied by third parties who are not parties to this case and he actually relied on these third-party accountants for the decisions with respect to the compilation of these figures.

And I have one other objection with respect to the best evidence rule which I had made before. The best evidence is the actual books --

THE COURT: Counsel, I am sure you appreciate that this is not a jury trial, that we are in equity and the Court is entitled to use at least some

imagination in its approach to this problem. And we feel that the records, as such, or at least the figures from the various records from the various Plaintiffs involved in this case, the way it has been explained, are sufficient. We overrule your objection and note the exception.

(EXCEPTION NOTED)

MR. BOREMAN: I offer in evidence Plaintiffs' Exhibit 1 with a proviso that in accordance with the Court's ruling the material relating to Stanwix Auto Park under the columns headed for the Duquesne Sixth Street Garage and Smithfield-Liberty Garage, since the lessees are the Parking Authority in this case, that material is deleted from the exhibit and the remaining exhibit is offered into evidence.

MR. BOEHM: Is it correct, Your Honor, to say that all that is being offered in evidence with respect to that is the information applicable to the parties to this case?

THE COURT: That is correct.

MR. BOREMAN: Yes. Let the record show that all other documentation in this exhibit are solely parties to this case. There are no others other than parties.

(Plaintiffs' Exhibit No. 1 was received in evidence.)

- - -

DIRECT EXAMINATION (Continued)

BY MR. BOREMAN:

Q Mr. Buzzard, to the best of your knowledge, the statements contained in Plaintiffs' Exhibit No. 1 are accurate reflections of the books of the companies that you examined?

A Yes, sir.

Q Will you select an example? Let us take the first example on your Alco Parking. Will you explain the organization of this book and how it was organized and what it is intended to show?

A Well, first off, we took all of the individual operating statements.

Q Of each Plaintiff?

A Of each Plaintiff, and we summarized those on a single sheet ahead of those individual reports.

Now, on the Alco Parking there's ten individual lots and there's ten individual --that is lots or garages, and there's ten individual sheets representing the 1968-1969 revenue and expense of those facilities and a 1970 projection

Q Tell us how you went about making that projection.

A The 1970 projection in all cases, these facilities and every

other one that is treated in this book, was based primarily on the actual parking revenue for the first six months of 1970 as carried on the books of the various Plaintiff companies. From that six months' revenue, we projected what the revenue for the entire year would be on the basis that the first six months it was 49.4 per cent of what the annual revenue would be.

Where did you get that 49.4 per cent?

We took 33 downtown parking facilities and listed their 1969 revenue by month, and we took the first six months and related it to the entire year and found that the rate relationship was 49.4 per cent.

That is for the year 1969?

1969.

Of those 33 facilities, you examined the first six months of their total yearly income for 1969 and it was 49.4 per cent of the yearly income?

That's right.

And, therefore, you used that same ratio on the first six months of 1970?

MR. BOEHM: Excuse me. I would like to place an objection on the record, Your Honor, to any 1970 projections made by this witness for the reasons that I have stated before. I didn't understand the

book contained 1970 projections at the time I made my objection, and I think for the reasons stated before with respect to his lack of qualifications he certainly is not in a position to make projections for 1970 which certainly involve accounting expertise.

MR. BOREMAN: Your Honor, he is a statistical expert, and if ever a man is competent to make projections I imagine a man who has had experience in statistics is. He is simply taking the figures of making a statistical projection. How else are we going to know what the prospective effect of their tax is unless we have some basis for judging?

THE COURT: We have already ruled on this.

(EXCEPTION NOTED)

BY MR. BOREMAN:

Q Continue, then, on how you arrived at that projection.

A Well, that accounts for how we arrived at the total 1970 revenue. In other words, we considered the first six months was 49.4 per cent of what the twelve months would be. The parking tax is very easily computed from the total revenue. Once you have a total revenue you multiply that by 19.6 per cent.

Q Why is that?

Well, the parking tax was 15 per cent for one month and 20 per cent for eleven months so that the average would be 19.6 for the year.

I think that is because the 20 per cent ordinance we are involved with here didn't become effective until February 1, so in January it was 15 per cent and from February on it was 20 per cent so it comes to 19.6.

The rent is -- it either stays the same if it's a fixed rental or in accordance with leases; if it is a rental which is -- goes up or down to some extent as a result of the revenue -- in other words, some of the leases have provisions where if the revenue is over so much, then 80 per cent of that overage goes into rent, so that the rent was figured out on the basis of those formulae that are contained in the leases. Wages and salaries -- Just a minute.

Did you examine every lease that is involved in every one of these lots?

Every one with the exception of the K-Seven.

THE COURT: The what?

THE WITNESS: K-Seven. It's the last one in the book. It's a company, Your Honor, and they did not -- their information came in very late and I was unable to contact the owner and get the information.

THE COURT: Where are they located?

THE WITNESS: They are downtown. They have several lots downtown. It's an individual operation. He has about four or five lots.

BY MR. BOREMAN:

Q With respect to the three major operators, you examined all their leases?

A Yes. Wages and salaries, we increased the wages and salaries over the 1969 figure shown by an amount of eight per cent because on August 1, 1969 there was an increase of 25 cents per hour for the garage attendants and in 1970, August 1, there was a further increase of 15 cents per hour. Now, if you calculate that out, that is a 9.7 overall -- 9.7 per cent overall wage increase. We used eight per cent to be on the conservative side because some of the wages and salaries involve cashiers who did not participate in the wage increase; but the garage attendant personnel represents something in the order of 90 per cent of the total personnel. So we used eight per cent to increase the 1969 salary.

All other expenses we assumed would -- for the purpose of projection we assumed would be the same as in 1969. We have no way of telling whether there was going to be any increase in use of materials and supplies, the maintenance of repair, so we just used the same figure that was -- the

same amount that was spent in 1969 to come up with a projection of what the total operating expense would be and from that figure we could determine the projected operating income or loss.

You did that with respect to Alco Parking Corporation and with respect to all others of the Plaintiffs?

All the others, that's right.

So that Exhibit 1 contains a study of the statistics for 1968, 1969 and a projection for 1970 for each individual lot?

Yes, sir.

And, then, the summary sheet summarizes that?

Yes, sir.

And shows the total operation of each Plaintiff for the years 1968 and 1969 and a projection of 1970?

Right.

And that, I believe, is shown on the summary sheet in front of each Plaintiff's tab?

That's right.

Now, I see that you have some other compilations on that summary sheet. Take Alco Parking. Would you explain to us what you did there with respect to the matter below the black line, the beginning of 1969?

It was desired that we show what different result would have been obtained in 1969, say, if the tax had remained at

10 per cent instead of being 15 per cent for eleven months in 1969, 10 per cent for one month, so that the information in the lower part of the summary for 1969 shows what the operating income or loss would have been had the tax remained at 10 per cent and also relating that to a percentage of the gross revenue for that year in each individual facility.

Q What about 1970?

A 1970 we did a similar compilation to indicate what the results would have been in the way of profit or loss. Number one, if the tax had remained at 15 per cent instead of going up to 20 per cent and what it would have been had the tax been 10 per cent; and those figures, those dollar figures and percentage figures, are shown across.

Q In other words, you showed what the net income or loss would be if the tax on the 1970 projection were 10 per cent, 15 per cent and 20 per cent?

A That is it.

Q And you also compiled the percentage of return.

Now, what is that a percentage of?

A That percentage of return is a percentage of the parking revenue, the amount of money that is taken in from the individual persons who park.

Q On that first column at Sixth and Penn I think you

inadvertently left out the percentage figure which is obviously zero.

Zero left off.

You did the same with respect to the Stanwix Auto Park operation, did you not?

Yes, sir.

And with respect to Meyers Brothers?

Yes, sir.

Now, will you turn to the Meyers Brothers operation in Exhibit 1, and what does that show with respect to the net income both in dollars and percentage for the years 1968, 1969 and 1970?

In the year 1968 it shows an operating income of $58,725.00

On what revenue?

On a revenue of $917,673.00. That is a percentage of 6.4 per cent on that revenue, $917,673.00.

MR. BOEHM: I can't hear you. Would you speak louder?

THE COURT: If you speak into the mike there I think your voice will probably carry.

THE WITNESS: I'll start all over again. For 1968 the operating income for Chatham Center Garage --

MR. BOEHM: Excuse me, Judge. I don't think

the microphone is on.

(Discussion held off the record.)

THE WITNESS: For the year 1968 the operating income for Chatham Center Garage was $58,725.00. The total parking revenue was $917,673.00, the income being 6.4 per cent of $917,673.00.

BY MR. BOREMAN:

Q What was the parking tax rate in that year?

A The parking tax rate in that year was 10 per cent.

Q Go on.

A In 1969 the operating income was $29,415.00 on a parking revenue of $967,323.00 or 3 per cent of the parking revenue.

Q What was the parking tax in that year?

A Parking tax was 15 per cent for 11 months, 10 per cent for one month. Had the parking tax remained at 10 per cent, the operating income would have been $59,320.00 or 6.1 per cent on a revenue of $967,323.00.

Q On the basis of your 1970 projections.

A Going to the 1970 projection, at the existing tax rate the operating income would have been $17,377.00 on a parking revenue of $1,015,188.00 or an income of 1.7 per cent. Now, had the tax remained at 15 per cent, the operating income would have been $64,076.00 or 6.3 per cent on a revenue of $1,015,188.00.

And had the tax been 10 per cent, the operating income would have been $114,835.00 or 11.3 per cent on $1,015,188.00 of revenue.

So that we understand just what this summary sheet and the exhibit is intended to show as a comparison, will you turn to the summary sheet for Alco Parking Corporation, that is the first one, and under the first column, Sixth and Penn Garage as well as all the other facilities shown on that page. That page shows the same information that you have just been detailing with respect to Meyers Brothers Parking?

It does.

That is as far as the format is concerned?

That is right.

Now, with respect to that Sixth and Penn Garage, will you tell us with respect to your 1970 projection percentagewise what would be the net income -- both percentagewise and dollarwise -- if the tax were 20 per cent, 15 per cent and 10 per cent?

Well, in the first place, the parking revenue is projected to be $370,445.00. With that revenue and with the expenses and the tax having gone up to 20 per cent, the result would be an operating loss of $23,902.00 in 1970. Now, if the parking tax had remained at 15 per cent the result would have been an operating loss of $6,862.00. If the tax had

been 10 per cent there would have been a profit of $11,660.00 or a return of 3.1 per cent on a revenue of $370,445.00.

Q Turn to the summary sheet on Stanwix Auto Park. Would you read off the operating income and the percentage as shown on Stanwix Garage for the projection of 1970?

A For 1970 only?

Q Yes.

A The projection in 1970 for parking revenue of $539,558.00 would have produced an income of $22,114.00 or 4.1 per cent on $539,558.00. Had the tax remained at 15 per cent the income would have been $46,933.00 or 8.7 per cent on a revenue of $539,558.00. Had the tax been 10 per cent the income would have been $73,911.00 or 13.7 per cent.

Q Now, with respect to all the lots combined by Stanwix Auto Park, the last column, what do those figures show for the 1970 projection?

A For the entire Stanwix Auto Park operation, that is the owned and leased facilities, the total revenue projected for 1970 would be $638,895.00 and the result would have been a loss of $13,604.00.

Q That is when the tax is what?

A That's when the tax is 20 per cent. If the tax had been 15 per cent it would have been -- there would have been a profit of $15,631.00 or 2.4 per cent on $638,895.00 of

revenue. And had the tax been 10 per cent there would have been an income of $48,789.00 or 7.6 per cent on a revenue of $638,895.00.

With respect to Alco Parking, what is the total result under the 1970 projection of all the lots operated by the Plaintiff Alco Parking Corporation?

The total parking revenues for Alco Parking for the year 1970 is projected to be $1,446,446.00. The result would have been an operating loss of $5,981.00 at the present rate of taxing.

At the 20 per cent rate?

At the 20 per cent rate. Had the parking tax remained at 15 per cent there would have been a profit of $56,755.00 or a return of 3.9 per cent on the revenue of $1,446,446.00. And had the tax been 10 per cent the profit would have been $123,507.00 or an 8.5 per cent return on $1,446,446.00.

THE COURT: Counsel, I believe at this time we will adjourn for the recess. We will reconvene promptly at 1:30.

(Luncheon recess taken.)

- - -

SEPTEMBER 15, 1970
Tuesday Afternoon Session

- - -

JOHN S. BUZZARD, called as a witness on behalf of the Plaintiffs, having been previously duly sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Continued)

BY MR. BOREMAN:

Q Mr. Buzzard, going back to Exhibit 1 and turning to the Alco Parking tabulation, what does it show the parking tax paid in 1968 was for the first lot?

MR. BOEHM: Which one are you on, Mr. Boreman?

MR. BOREMAN: Alco Parking, the first lot, Sixth and Penn, the first garage.

THE WITNESS: The individual tabulation for the Sixth and Penn Garage showed that in 1968 the parking tax paid was $34,154.00. That was at the rate of 10 per cent. For 1969 the parking tax paid was $49,088.00, and that's at the rate of 15 per cent for 11 months and 10 per cent for one month, an average of 14.6 per cent for the year. The projection is that in 1970, on a revenue of $307,445.00, the parking tax will be $72,607.00 at the 20 per cent rate.

MR. BOREMAN:

Comparing 1969 and the 1970 projection, what is the gross revenue for 1969 and the gross revenue for 1970?

The gross revenue for 1969 is $395,862.00 and the projection is $370,445.00.

So even though the revenue has decreased by approximately $25,000.00, the tax has increased by approximately $23,500.00 is that correct?

That's right.

Exhibit 1 throughout will show these relative increases in revenue and increases or decreases in tax, will they not?

That is correct.

Let us just take one more example. Turn to the Stanwix Auto Park under the first one, Stanwix Garage.

What was the tax in 1968?

The tax in '68 was $52,306.00. In 1969 the tax paid was $76,165.00 and that was on revenue of $522,476.00. And in 1970 the projection shows a parking tax of $105,753.00 on a parking revenue of $539,558.00.

So with an increase of $17,000.00 in revenue there was an increase of approximately $29,500.00 in tax between 1969 and the projection for 1970?

That is right.

Turn to Meyers Parking system.

What is the parking tax in 1968?

A The parking tax in 1968 was $82,034.00 on a revenue of $917,673.00. In 1969 it was $126,638.00 on a revenue of $967,325.00, and the projection for 1970 is that the parking tax will be $198,977.00 on a revenue of $1,015,188.00.

Q So that on an increase in revenue over approximately $48,000.00 we have an increase in tax of approximately $62,000.00 between 1969 and the 1970 projection?

A 72,000.

Q 72,000?

A Right.

MR. BOREMAN: Incidentally, Your Honor, we have here a summary of each of the leases that are involved with these Plaintiffs from which Mr. Buzzard made his studies and made this report. We don't want to introduce them into evidence because we just don't want them public, but they are available for Mr. Boehm to read at any time he wants. He can have the original leases if he wants, but we have made a convenient summary to show the terms of all the leases.

MR. BOEHM: Do you want to give them to me? I will take them.

MR. MARTIN: No, we don't.

MR. BOEHM: I can't examine them here while I am trying the case.

MR. BOREMAN: You will have an opportunity while the trial is in progress overnight if you want to examine them. I don't mean you can examine them at this moment. I just want him to know that the summaries of the leases are available for him to examine.

(Plaintiffs' Exhibit No. 3 was marked for the purpose of identification.)

MR. BOREMAN:

I show you what has been marked Plaintiffs' Exhibit 3 and ask you to identify what it is.

This Exhibit No. 3 is a comparison of the 1969 receipts from the business privilege, mercantile and parking taxes and the number of taxpayers or business facilities paying each type of tax.

Did you compile that exhibit?

Yes, I did.

What was your source in compiling that exhibit?

Insofar as the business privilege tax and the mercantile tax, the amount of the receipts was taken from the controller's report.

City controller?

A City controler's report for the fiscal year ending December 31, 1969. Insofar as the parking tax is concerned, that data was obtained from the City treasurer's division of parking tax receipts.

Now, insofar as the number of taxpayers is concerned, and with reference to the business privilege and mercantile tax, the number of returns was obtained from the data processing office of the City treasurer; and as to the number of facilities paying parking tax, that was obtained by actual count of the number of accounts which the particular division which handles the parking tax audited during the year 1969.

Q What does this document show with respect to the amount of business privilege, mercantile tax and parking tax paid and the number of taxpayers?

MR. BOEHM: Excuse me. I object, Your Honor, because this evidence is irrelevant, incompetent and immaterial. I don't see how that it affects any of the issues in this case. It involves the mercantile tax, the business privilege tax, neither one of which taxes are attacked here.

MR. BOREMAN: Your Honor, we believe that this is an essential document to show the comparison as to the amount of tax that is paid on these three

taxes. We are arguing uniformity here. We are arguing confiscation, and we think the Court ought to know the comparison as to how much tax was paid under each of these taxes and who paid them, the number of taxpayers paying them, because we think it shows the greatly disproportionate amount paid in the parking tax as compared to these other two taxes. One of the points we have in our case is that all other businesses are taxed once, the business privilege tax, six mills, or the mercantile tax, one mill wholesale. The parking tax on the exact same receipts on another business for the same kind of a privilege and the same kind of a tax, an excise tax, we are paying 200 mills plus the 6 mills. Parking operators are paying 206 mills, all other businesses are paying 6 mills. We think we have a right to show the comparison.

MR. BOEHM: If Mr. Boreman is going to testify, Your Honor, I would like to have the opportunity to cross-examine him and have him sworn as a witness.

MR. BOREMAN: These figures show the comparison of the tax payments.

THE COURT: We are in a court with counsel here The mercantile tax and other taxes are not involved

here.

MR. BOREMAN: They are in uniformity, Your Honor. I submit respectfully to you the question of uniformity and I think on confiscation as well.

THE COURT: It isn't a question of the amount of the tax. Uniformity may have some relevancy with respect to here is a mercantile tax, here is a business tax and parking tax and half a dozen other taxes --

MR. BOREMAN: Your Honor, we have another contention. One of our points we are urging is that this is double taxation and we want to show the amount of double taxation on this.

THE COURT: Have you alleged that in your complaint?

MR. BOREMAN: Yes. It is in our complaint and it is in our memorandum. We have a separate section arguing the point.

MR. BOEHM: Your Honor, I have researched that point. There is nothing wrong with double taxation. There is no law which forbids a business from being taxed twice.

MR. BOREMAN: We think we presented the argument in our trial memorandum, if Your Honor will read it.

THE COURT: If you have alleged that we will permit you to explore this phase on the basis of what your allegation was in your complaint.

MR. BOEHM: Your Honor, this document is prepared for the purpose of showing that a few taxpayers pay a lot of taxes on the parking tax and that many taxpayers pay, I suppose, a lot of taxes with respect to other taxes. How can that be really relevant as to the issues involved in this case.

MR. BOREMAN: I think it bears on the issue of double taxation.

THE COURT: Counsel has suggested that it has some bearing in view of the fact that they claim in their complaint that it is double taxation. The Court will consider that, whatever the value of that exhibit may be, for what it may be worth.

MR. BOEHM: The exhibit doesn't show, does it, how much business privilege tax or how much mercantile tax you pay, is that right, the Plaintiffs in this case?

MR. BOREMAN: Yes, it does. It shows how much parking tax we pay.

MR. BOEHM: I didn't say parking tax, I said

business privilege and mercantile. If that exhibit showed that, then it could be admitted, I suppose, if the Judge says double taxation is illegal, to show you pay more than one tax and then we can discuss whether you pay it on the same thing or on something else. But it's not even intended to show that.

MR. BOREMAN: We can easily show that, but it seems to me this exhibit is relevant because of the two facts, double taxation, confiscation, uniformity. It seems to me there are three bases there to begin with. I think the question is the weight of it and not so much the relevancy of it or the admissibility of it.

THE COURT: We will permit you to follow through on that.

BY MR. BOREMAN:

Q What does it show?

A Well, the exhibit shows that insofar as the business privilege tax is concerned, the receipts for 1969 as reported by the City controller were $4,501,221.87 paid by 13,974 taxpayers. The mercantile tax, the receipts as shown by the City controller's report for 1969 produce a total revenue of $2,021,826.85 paid by 7,250 taxpayers.

Now, with reference to the parking tax, the receipts for 1969 as reported by the City treasurer were $2,121,442.0(paid by 299 individual parking facilities. Now, that is different from the number of taxpayers on account of the fact that the parking tax is collected for each individual lot or garage.

That is one taxpayer who owns ten lots may file ten returns?

That's right.

Now, with reference to the parking tax paid by the Plaintiffs in this case, the amount was $1,304,004.00 and was paid on 59 separate facilities.

MR. BOREMAN: I offer in evidence Plaintiffs' Exhibit 3.

THE COURT: We will admit it with some qualification as to the consideration as to what it may be worth in view of counsel's objection as to the relevancy.

(Plaintiffs' Exhibit No. 4 was marked for the purpose of identification.)

MR. BOREMAN:

I show you what has been marked Plaintiffs' Exhibit 4 and ask you what it is?

Exhibit 4 is the amount of real estate tax exemptions on garages in the Pittsburgh Parking Authority as calculated

from the exempt assessments on record and existing tax rates.

(Plaintiffs' Exhibit No. 5 was marked for the purpose of identification.)

BY MR. BOREMAN:

Q I show you what has been marked as Plaintiffs' Exhibit 5, I ask you what that is.

A Exhibit No. 5 is a tabulation showing the amount of parking tax paid for the years 1963 to 1969 inclusive compared with the amount of real estate and mercantile tax receipts for those years.

MR. BOREMAN: I offer in evidence Plaintiffs' Exhibits 4 and 5. The basis of these, Your Honor, is to show a comparison of real estate taxes from which the Parking Authority is exempt whereas the private operators pay the real estate tax and also pay the parking tax.

MR. BOEHM: I object, Your Honor, for the reason that this evidence is irrelevant, incompetent and immaterial. It is a question of the uniformity, apparently, of the parking tax, and I still don't understand how these other taxes become involved. The parking tax is imposed uniformly on Parking Authority garages as well as private operators. We don't need an exhibit to prove that the Parking

Authority is exempt from real estate taxes. There is no doubt about that.

MR. BOREMAN: Your Honor, it is in our complaint that the part of the uniformity issue is that the Public Parking Authority is exempt from real estate taxes and we have to pay real estate taxes, private operators.

THE COURT: The Authority is exempt under the law, isn't it?

MR. BOREMAN: Yes.

THE COURT: That is no basis for lack of uniformity.

MR. BOREMAN: We are not contending here that we ought to be exempt from real estate taxes. We are trying to show that for the exact identical function the Parking Authority is exempt from real estate taxes which enables it to make a profit which we can't make because of the fact that we pay real estate taxes. I think we have a right to show what those real estate taxes are.

THE COURT: I am not satisfied that this goes to the crux of the issue.

MR. BOREMAN: I agree with you. It doesn't hit precisely on the issue. I think it is relevant to

see the whole picture to see what is being done here, what taxes are being paid by these respective bodies. I think that Your Honor can consider that. I don't claim that this is the vital controlling matter in the case.

THE COURT: I don't want to get the record involved with a lot of collateral material here that is irrelevant. That is what I am trying to get across to you, and I think in view of the summary of these two exhibits this is not relevant and accordingly we are going to sustain your objection, Mr. Boehm.

MR. BOEHM: Thank you.

(EXCEPTION NOTED)

MR. BOREMAN: We have an automatic exception noted on all of these, Your Honor.

(Plaintiffs' Exhibit No. 6 was marked for the purpose of identification.)

BY MR. BOREMAN:

Q I show you what has been marked Exhibit 6 and ask you to identify that, Plaintiffs' Exhibit 6.

A This is -- Plaintiffs' Exhibit No. 6 is a comparison of the parking rates in effect at two privately owned parking garages.

For the Plaintiffs?

Plaintiffs' parking garages and one Authority garage, namely the Sixth Street Garage and the two Plaintiff garages are the Stanwix Garage and the Gateway Center Garage. They are a comparison of their rates for the years 1967, 1968, 1969 and 1970.

MR. BOREMAN: Now, Your Honor, before introducing the evidence I want to state that the purpose of this exhibit is to compare the rates of the private operators with a Parking Authority garage to show the difference in rates is a basic argument which we will be called upon to meet that we cannot pass on this tax, that our rates are sufficiently higher than the competitor, the Parking Authority garage, we are unable to pass on the rates. And I think this exhibit is relevant for the purpose of showing that we can't pass on the rates, that they are now as high as they can be; and I offer in evidence Exhibit 6.

MR. BOEHM: I object to it, Your Honor, and state unequivocally that the exhibit cannot be relevant for that purpose. It is not a question of the private lots being unable to compete with an Authority lot or because of the fact that the

Authority lot has a real estate tax exemption, the law specifically authorizes the creation of a Parking Authority for that very reason the same as we franchise the Port Authority and other segments of business, and we know that private operators because they want the utilities franchised or subsidized by the Government are in a difficult position to compete. That is not the issue in this case.

THE COURT: We appreciate that, but I assume that what the Plaintiffs' point in these exhibits is is not so much to point out that the Authority is tax free whereas the private parking facilities are not, it is to point out the background to show that this so-called tax that is placed on the private industry cannot be passed down, that it is basically on the circumstances involved in each particular area that has this parking setup, and it is through that that this tax has created this unequal situation that has, according to their position, I gather, made the setup confiscatory insofar as that tax is concerned.

MR. BOEHM: Your Honor, is not this tax imposed uniformly on the private lots the same as

it is on the public ones? They are talking about a real estate tax which is not imposed uniformly because the law has specifically exempted the Parking Authority from the real estate tax.

Now, if the purpose, however, of this kind of an exhibit is to show that they can't pass the increased parking tax of five per cent onto the consumer, then I think it has to be irrelevant. By showing a difference in rates you don't show that. The way to show that is, "After the increase in tax we raised our prices, but when we raised our prices our volume was decreased, therefore we lose customers when we raise a price."

There hasn't been any evidence to that on the stand yet. That is the way to show --

THE COURT: I am not saying that is the purpose of this exhibit. This may be one of them --

MR. BOEHM: That is what Mr. Boreman said it was.

THE COURT: In any event, all of this taken together sets the picture for the Court to make a decision one way or another as to the Plaintiffs' position here in this matter. And assuming that Mr. Boreman will follow through with his exhibits

in explaining the situation with probative evidence we will permit him to proceed and on that basis overrule your objection.

(EXCEPTION NOTED)

(Plaintiffs' Exhibit No. 7 was marked for the purpose of identification.)

BY MR. BOREMAN:

Q Mr. Buzzard, will you explain how that was prepared on the basis upon which it was prepared?

A I prepared this exhibit. The rates for the Duquesne and Sixth Street Garage are published by the Port Authority -- by the Parking Authority each time there is an increase in rates on a sheet like (indicating) that.

Q By the way, these rates are following a rent increase put in by the Parking Authority?

A Well, the 1970 rates were effective February 1, 1970. And the 1969 rates became effective January 21, 1969 for the Parking Authority. The other rates were obtained from the records of the Plaintiffs' operations and were set down for each hour as has been shown on the exhibit so that it will be possible to -- by checking across for each hour to see the difference in the rates.

Q Now, I show you what has been marked as Plaintiffs' Exhibit No. 7 and ask you what that is.

This is an exhibit entitled, "Average Parking Rates," and it is an excerpt from the 1969 Parking Study for Pittsburgh, Pennsylvania Central Business District made for the Pittsburgh Parking Authority by Wilbur Smith and Associates dated June 9, 1970. It compares the one hour, two hour, three hour and all-day parking rates for 20 public lots, for 8 public garages and for 8 Parking Authority garages.

MR. BOREMAN: Your Honor, by way of preliminary statement before offering this in evidence, this is the same as Exhibit 5 except it is an average study, the study of these number of lots and garages in which the figures have been averaged for a comparison

MR. BOREMAN:

What was that prepared from?

As I said, the source of this was the 1969 Parking Study for Pittsburgh, Pennsylvania Central Business District made by Wilbur Smith and Associates dated June, 1970.

MR. BOREMAN: I offer in evidence Exhibit No. 7.

MR. BOEHM: I object, Your Honor.

THE COURT: We will overrule your objection.

(Plaintiffs' Exhibit No. 7 was received in evidence.)

MR. BOEHM: It is irrelevant, incompetent and

immaterial and hearsay.

THE COURT: We are inclined to agree with you, but we feel it may have some significance.

(Plaintiffs' Exhibits Nos. 8, 9 and 10 were marked for the purpose of identification.)

MR. BOREMAN: Your Honor, I have no further questions at this time of Mr. Buzzard, but I would like to offer into evidence Plaintiffs' Exhibit 8 which is the original parking tax ordinance of 1962.

THE COURT: Is that the City of Pittsburgh?

MR. BOREMAN: The City of Pittsburgh Parking Tax Ordinance of 1962. I would also like to offer Plaintiffs' Exhibit 9 which is the present parking tax ordinance which is in controversy in this case. There is a third ordinance, the one that was passed in 1968. I don't have a copy. I would like to produce a copy tomorrow.

THE COURT: Is it necessary to have all these prior ordinances in evidence or is it just the ordinance that you are complaining about?

MR. BOREMAN: Well, Your Honor, there is a question that arises as to whether or not if you were to declare this ordinance invalid on the ground of lack of uniformity it would necessarily

make the others invalid since 1962, and I think that --

MR. BOEHM: They are not effective any more. They are gone.

THE COURT: They are not in effect.

MR. BOREMAN: Are you saying they are no longer in effect?

MR. BOEHM: No, the legislature has set it, the local tax, it says you must pass it every year.

MR. BOREMAN: You don't pass the parking tax every year.

MR. BOEHM: That is why you have all those different ordinances.

MR. BOREMAN: You didn't pass it between 1962 and 1968. It was in effect every year.

MR. BOEHM: We should have. If we didn't, we could be in trouble, I would think.

MR. BOREMAN: All right, I will restrict it to introducing --

THE COURT: Put into evidence the ordinances involved in this proceeding.

MR. BOREMAN: I offer into evidence Exhibit 8.

MR. BOEHM: No objection.

THE COURT: It is admitted.

(Plaintiffs' Exhibit No. 8 was received in evidence.)

MR. BOREMAN: I offer into evidence Plaintiffs' Exhibit 9 which is Ordinance No. 675 of the City of Pittsburgh, the business privilege tax ordinance, which I think is relevant, Your Honor, because this is one of the things that we are saying in reference to double tax and in uniformity.

MR. BOEHM: I object.

THE COURT: We will admit it. We will admit the exhibit.

(Plaintiffs' Exhibit No. 9 was admitted in evidence.)

MR. BOREMAN: You may cross-examine.

- - -

CROSS-EXAMINATION

BY MR. BOEHM:

Q Mr. Buzzard, when were you retained by Mr. Boreman to compile this report?

A I wasn't retained by Mr. Boreman. I was assigned to the job by Mr. McNeil, and I don't know just exactly when he was retained by Mr. Boreman.

Q When did you begin the preparation of the report, Mr. Buzzard?

A I think it was back in June that I started on it.

In June of 1970?

Right.

When was it completed?

Last night.

Last evening?

Last evening.

With respect to the various owners of the parking garages that you have listed here, did you take into consideration all of the parking facilities owned by each of those owners?

We took them into consideration, but there are some that are not in there. For instance, the Allegheny Center Garage and Alco is not in here on account of the fact that that is a very special situation. It has --

The answer is "No," is that right, you did not include all of the parking facilities owned by each of the parties to this case when you compiled this report?

MR. BOREMAN: Your Honor, I think he has a right to explain his answer.

THE WITNESS: I was trying to explain how many were --

MR. BOEHM: He does. I am going to ask him that next, but I would like him to say "Yes" or "No" first and then explain it.

THE WITNESS: No.

BY MR. BOEHM:

Q And, then, the next question is, how many facilities are missing and what are they?

A The Alleqheny Center Garage is missing from the Alco operation, the Roosevelt Annex lot is missing from William Penn Parking Lots.

Q From independent parking lots, is that what you said?

A From William Penn Parking Lots.

MR. BOREMAN: I am sorry, I didn't get that.

MR. BOEHM: Is that microphone working yet?

MR. BOREMAN: No.

THE WITNESS: It was included on account of a major change that was made in the size of that lot so that the information concerning it was in no way comparable.

MR. BOREMAN: Which lot is that?

THE WITNESS: It isn't even listed. It's the Roosevelt Annex lot of the William Penn Parking Lot partnership. The Meyers Parking System has a garage in the University Health Center which was not included because it is operated on a management fee and it is not a comparable operation. The Carlton House Garage is not included, I'm not sure what company that is -- Alco, on account of the fact that

that is a special management-fee arrangement and is not comparable to any of the other operations.

M. BOEHM:

Is the Carlton House Garage, do you know, subject to the parking tax?

I'm sure it is. I'm sure it is. All the others are. The University Health Center Garage --

Residential parking, so far as you are concerned in preparing this report, is taxed the same as commercial?

I didn't understand your question.

Are you assuming that the parking tax is imposed on residential parking the same as it is on commercial parking?

No, sir. No.

Is the Carlton House Garage residential parking or commercial?

It is partially commercial, and I suppose there are some tenants up there who enjoy the residential parking classification.

But you don't know, is that right?

I don't know. We didn't make a study of that.

Is that all, sir?

That's all.

Those four are omitted but all of the other parking facilities owned by the Plaintiffs in this case are included, is that right?

A Yes.

Q Regardless of whether those facilities are subject to the parking tax? Maybe I can rephrase it if you are having a little difficulty.

The question is, did you include in your figures facilities owned by these operators which are not subject to the parking tax but located in the City of Pittsburgh; for example, residential parking lots?

A I included all of the operations that they submitted to me as being commercial parking operations. If they have others, I don't know about them.

Q Did you compare the incomes received from the commercial as opposed to the non commercial?

A With reference to those --

MR. BOREMAN: If the Court please, I object to that question as being irrelevant. The ordinance itself does not tax residential parking.

MR. BOEHM: I withdraw that question.

BY MR. BOEHM:

Q Let me ask you this question: Did you see a financial return of each operator which included their returns from the parking lots that are taxable and also the returns from the parking lots that are not taxable?

MR. BOREMAN: That is objected to as being

irrelevant, Your Honor. This witness was engaged through Mr. McNeil's office to prepare the financial data of gross revenue and expenses of commercial parking operations, which he has done. I don't see any relevance to whether he saw non commercial or residential and compared them.

THE COURT: That is germane to the subject here. He can answer the question "Yes" or "No."

Answer the question, if you can.

THE WITNESS: I did not examine any records of any facility which was entirely residential. In some of the facilities that we examined there was a portion of their revenue that was due to what is termed "Rental by their tenants." We knew what that amount of revenue was.

MR. BOEHM:

How did you determine that, sir?

It was listed in their ledgers.

Listed where, in their records?

In their ledgers.

What happened when you prepared this compilation was that you took the records that they gave to you on the representation that they were the records that were involved in this case and made your summaries just from those records,

is that right?

A That is correct.

Q So that you assumed that they gave you, of course, all the records that were material to the case?

A That is correct.

Q Now, with respect to Allegheny Center, which is the first one you mentioned that you omitted, that is one that is owned by the Alco Corporation. Why is it that you eliminated that one from your consideration?

A That is not owned by Alco. It is operated by Alco Corporation for a lessee of the garage. The matter of rent is in -- is under reconsideration, and it's a matter in a state of flux and, therefore, we could not say exactly what the rentals are going to be. And we did not want to show a picture for that particular operation that was not comparable.

Q Is the Alco Corporation a corporation that is run by Mr. Stabile?

A It is.

Q Did you have any difficulty in obtaining the records of Mr. Stabile?

A No, sir.

Q They were all in good shape when presented to you in the first instance?

The corporate records were complete, as I explained at the outset. They were not broken down by individual facilities, and it was necessary for us to break them down by individual facilities.

Do you have with you in court, sir, the information submitted to you by these various individuals that you used to compile this report?

No, I don't.

You have it in your office?

That's right.

Why is it that the Roosevelt Annex lot -- you said before that there was a major change made in the size of the lot and that is your reason for not including that one, is that right?

Right.

And you also eliminated the Meyers Parking System lot at the University Health Center, is that right?

That's right.

Why did you eliminate that one?

That is a relatively new facility. It's on a management-fee basis, and the expense figures are not comparable with one that is a leased or owned facility.

And the last one was the Carlton House Garage.

The same thing applies there. It's a management-fee basis,

and the operator doesn't even handle the receipts.

Q There are some garages that you have in your report that are operated on a management-fee basis, aren't there?

A Yes.

Q I notice that in your summary with respect to these corporations, for example the Alco Parking Corporation which is the first one, I can't find any listing of the net profit of the corporation as a result of the operation of these eight lots, eight different lots -- ten different lots. There are ten different lots.

Did you compute that, sir?

A No, sir.

MR. BOREMAN: I don't think he understands your question.

Read the question again.

(The last question and answer were read.)

THE WITNESS: The reason my answer is no is that this is the revenue from parking operations only. There are other income, concessions and so on. This was prepared on the basis of parking revenue only.

BY MR. BOEHM:

Q So that the corporation has other income which you did not consider and this report in no way reflects the actual

financial condition of the Alco Parking Corporation as a whole?

I am not enough of a C.P.A. to say whether or not it does or it doesn't. The concession income is relatively small, what I saw.

Sir, don't testify to that unless you can tell me what it was or what the proportion was. If you have the records to back that up, I think you can testify to it; but don't guess.

You don't know what it was, do you?

No, I don't know what it was.

Your study didn't include that?

We definitely ruled it out. We did not want to include anything else except revenue from parking.

And that was restricted, too, because you have omitted those four parking facilities.

Now, for example, in your breakdown with respect to Alco, which would be on the second page of your report, you break down operating expense, and the first category is taxes. Are the federal taxes paid by the Alco Corporation listed there as an operating expense?

You mean income taxes?

Whatever federal taxes they pay, sir.

Anything other than income taxes if there were federal taxes,

and I don't know what they would be.

Q You don't know what federal taxes a corporation has to pay, do you?

A If there were federal taxes that were payable as an operating expense they would have been listed on their statement and they would have been included in here under "Other taxes," but federal income taxes were definitely not included.

Q Why was that?

A Because it's not an operating expense.

Q It wasn't an operating expense for your purpose?

A Federal income taxes are not an operating expense.

Q Why do you distinguish between federal income taxes and these other taxes considering one of them as an operating expense and the other as not being an operating expense?

A Because I was informed by the accountants that that is accounting practice.

Q In fact, all of the practice that you yourself employed in compiling this report with respect to accounting was obtained from someone else, you have no knowledge of accounting practices yourself, do you?

A I wouldn't say I don't have any.

Q You do have that course you took.

A I was governed by the accountants for these various companies.

Let us take the Alco Parking Corporation No. 1 Item under "Operating Expense."

Are there any federal taxes included under "Operating Expense" at all? You have said that there is no federal income tax. Are there any other federal taxes included there?

No, sir.

None whatever.

Did you ask to see a federal tax return that was filed by any of these people who are parties to this suit?

No, sir.

You understand that a corporation does file a return citing its corporate net income?

Yes, sir.

And an individual files a Schedule C.

Yes, sir.

You never saw any of those kind of tax returns at all?

I was not auditing their accounts.

And those kind of taxes are not included under the heading of "Operating Expense," right?

They are not.

Did you compute, sir, for purposes of compiling this report, the percentage of increase, for example, of the operating

expense comparing the operating expense during the year 1968 and the operating expense during 1969 to see what the percentage of increase or decrease would be during those two years?

A No, sir.

Q You don't know, then, whether the percentage of operating expense increase is less or more than the increase in the amount with the parking tax?

A I do know that, yes, sir.

Q And what would the answer be?

A The answer is that the increase in the parking tax is much greater than the increase in the operating expense. I know that from study of the figures. It's perfectly obvious.

Q With respect to every one of these corporations?

A I wouldn't say that there might not be one which had some unusual increase in operating expenses which might have -- for instance, one of the large parking garages, the operator had to repair an entire floor which increased his operating expense by $20,000.00. That was a one-shot proposition. That might have in that particular instance increased the operating expenses for that year greater than the amount of parking tax. I'd have to look at it. But in general the amount of parking tax was far greater than any of the other items contributing to operating expense.

Q So that in your opinion, with respect to each of these people that are included in your report, the percentage of the operating expense increase from one year to another is less than the percentage of parking tax paid when there has been a parking tax increase?

A Well, now, wait a minute. The parking tax is a part of the operating expense. What I said was that the other items of operating expense did not go up commensurate to the parking tax.

Q That is what I wanted you to answer. And that is true with that one exception?

A Possibly. I'd have to look at that one and examine that to see whether that is actually the case, but it could be.

Q Now, as I recall, when you compiled your projections for 1970, what you did was to fiqure out what percentage of the total revenue was attributable to the first six months during 1969, and I think you came to the conclusion that that was 49.6.

A 49.4.

Q And you figured that for 1970 the first six months would represent 49.4 per cent of the income, also, is that correct?

A Right.

Did you take into consideration when making that projection

that business could increase? For example, one of the factors which occurs to me offhand would be the stadium. Alco Parking, I suppose, will be running the new stadium parking lot, is that correct?

MR. BOREMAN: That is objected to, Your Honor. The stadium is not yet opened and it is not in this compilation. We have not even considered it.

MR. BOEHM: That is my point.

THE COURT: Objection overruled. Proceed.

(EXCEPTION NOTED)

MR. BOREMAN: The objection also is, Your Honor, the best evidence is Mr. Stabile.

MR. BOEHM: That was my original point, Your Honor, but for some reason we came up with Mr. Buzzard instead, so we have to do the best we can.

MR. BOREMAN: It is not in this book at all. There can't be any figures.

THE COURT: This is cross-examination, and I am sure you are well aware of the fact that we give a pretty wide latitude to cross-examination, particularly if there is anything that is germane to the original subject. We feel that there is something germane.

MR. BOREMAN: Your Honor, I am not going to

pursue this further, but it seems to me that the stadium isn't even in that book, how can he project anything. It didn't exist in 1969, it doesn't yet. How can he say the stadium is more or less.

MR. BOEHM: I thought I saw a ball game there.

MR. BOREMAN: Oh, come on, Mr. Boehm.

MR. BOEHM: Would you read that question back?

(The last question was read.)

MR. BOREMAN: I have no objection to the first part of the question, did he take into consideration that business could increase.

THE COURT: Counselor, we have already overruled you.

MR. BOREMAN: Very well, Your Honor.

THE COURT: Will you answer the question, if you can?

THE WITNESS: The answer is no.

THE COURT: Now, let us proceed.

BY MR. BOEHM:

Your 1970 projections in no way take into consideration significant increases which may or may not occur which you didn't have available in 1969?

Do not, nor do they take into consideration the considerable decrease that will undoubtedly occur from the opening --

or the closing of Forbes Field with reference to the -- some of the lots of the Alco Parking such as the Syria Mosque lot, the Simon Temple lot and the O'Hara Street garage.

Q You can testify that there will be a decrease because of the closing of those lots in 1970?

A I can't testify to it any more than I can testify that there is going to be an increase due to the opening of the stadium.

Q Excuse me, I thought you had said -- you just did testify that there will be a decrease due to the fact that the Syria Mosque lots and these other lots were closed.

A I said we didn't take into consideration the fact -- if I said "will be" -- I said there might be a decrease and there might be an increase in the North Side parking.

MR. BOEHM: Your Honor, I would like to request at this time, since Mr. Buzzard has never seen them or has never had them available to him, that the Plaintiffs produce in court in line with Your Honor's suggestion this morning their federal income tax returns for these three years -- for 1968 and 1969, the 1970 they wouldn't have yet, the corporate file returned on behalf of the corporations and the individual return Schedule C filed on behalf of the

individuals.

MR. BOREMAN: As I said before, I have no objection to furnishing them, Your Honor. I submit to you that the returns are irrelevant because, as the witness has testified, he was engaged in what we thought was the only relevant thing in this whole case which was, what do the parking operations as parking operations do, what is their revenue, what are their expenses, was their profit and loss, and that bears on the issue of confiscation. Alco Parking Corporation might own real estate, and I think does, gets rentals outside of the parking business, may have exchanges of property, may make profit on all sorts of things, but what does that have to do with whether the parking tax is confiscatory on the parking business? I submit to you that under the testimony of this witness, he has combed the records and has testified from the records he has produced in this booklet, the revenue of parking and the expenses of parking and anything else is irrelevant. I submit that he can look at anything he wants, but for us to now be compelled to produce income-tax returns which contain all other sorts of material -- in fact, it absolutely is of no benefit or relevancy to this

Court because in the income tax return of Alco Corporation there is no conceivable way that you can check the revenue and expenses isolated of the parking business which is what we are talking about. There is no conceivable way.

MR. BOEHM: I think what Mr. Boreman --

MR. BOREMAN: It is simply a fishing expedition with no purpose in mind.

MR. BOEHM: The purpose in mind is to see whether or not Mr. Boreman is proving what he said in chambers he would be able to prove, that these corporations as a class are being put out of business by reason of this tax.

MR. BOREMAN: You are misquoting me.

MR. BOEHM: I am sorry if I am.

MR. BOREMAN: I said these Plaintiffs in their parking operations are being put out of business, the parking business, by reason of this tax. Now, Alco Corporation could go out of the parking business and go into the real estate business as Alco Corporation.

MR. BOEHM: I understand that they are only in the parking business; but I think if they are making a handsome profit on areas that are not subject to

this tax, or, for example, the four lots which are subject to the tax and just by reason of Mr. Buzzard's decision eliminated here, we can't really get a true picture of whether these corporations are surviving because of their parking operations unless we see the income tax.

THE COURT: How are you going to separate the wheat from the chaff in the income tax statements?

MR. BOEHM: The problem here is, Your Honor, they have the burden of proving confiscation. They are attempting to do it by having each one of these owners select certain records which those owners think are relevant for purposes of this suit, hand them to Mr. Buzzard, have Mr. Buzzard analyze them, come into court and testify to them and say, "That is all we are required to prove or submit to the Court."

MR. BOREMAN: That is a complete misstatement, Your Honor, and Mr. Boehm ought to know it.

First of all, Your Honor, Allegheny Center is a lease -- we have a statement here, we will show it, two hundred fifty, or thereabouts, thousand loss. We had it in the book and took it out because we thought it was unfair to show over a $200,000.00

loss, and we will testify as to why it is completely an unfair statement; not a profit, a loss, two hundred to two hundred fifty thousand loss. We took it out because we thought it was unfair at my request, not at the owner's request.

Meyers Brothers is not Alco Corporation. The reason for that is it belongs to the University, and we will show the reason why we left that out. We have 59 facilities there. Four were left out for reasons which we will explain on rebuttal and not because the ownersaid, "We have decided they are real good things and we will take them out."

Your Honor can hear the testimony as to why they were taken out. For example, I have a financial statement of Allegheny Center that I didn't introduce into evidence because I thought there are circumstances which can be explained that would show a loss of $227,000.00, a loss of $615,000.00 in 1968. I didn't introduce it because it is not a fair reflection and there are other reasons. Out of the 59 facilities we left out four, and he is accusing us of selecting certain ones and giving you a false picture.

MR. BOEHM: All I want is the privilege of

determining for myself whether it is fair or unfair to have this testimony in evidence. I think Mr. Boreman is a fair man, but I feel it is my duty to make this decision.

MR. BOREMAN: I object on the ground that it is irrelevant.

THE COURT: What trouble would it be for you to submit your income tax reports for the perusal --

MR. MARKS: Mr. Meyers' system is a huge -- it would be hard for the City solicitor to pick out what is relevant to this operation. If he wants particular information to the figures in this book he can have them.

THE COURT: Is this a national hookup, so to speak?

MR. MARKS: Yes. We are a subsidiary of Hertz which is a subsidiary of R. C. A. I don't think it would be helpful to anybody in this case to require national income tax returns.

MR. BOEHM: There is a serious question here that is going to have to be determined as a matter of law after the testimony is closed here because Mr. Boreman and I disagree on the question of what really constitutes a confiscation. Does it mean that

an individual is being put out of business or does it mean that he is not able to make a reasonable profit, as Mr. Boreman alleges, as a result of an operation now, according to the testimony, restricted to certain operations subject to the tax and even that being restricted. There is a basic legal problem there. It is too late after the legal question is decided to say to me, "I think you have the opportunity to see those tax returns," and the Court has been very liberal with respect to the introduction of other evidence. There is no jury here, as the Court has said, and I don't see what harm it will do to have me see those returns.

MR. BOREMAN: We are not talking about a corporation and all of its activities, we are talking about a parking business.

THE COURT: It is for the Court to decide and to separate the wheat from the chaff, so what harm will it be if counsel wants to examine income tax returns? You see, the burden rests with you people to prove your position beyond the fair weight of the evidence and to satisfy the Court from the probative evidence.

MR. BOREMAN: May I make my position to the

effect that, as I understand it, we are talking about the parking business, and I am saying that this tax is confiscatory as to the parking operations of these Plaintiffs. I don't care if the corporation of which -- for instance, I don't care if Meyers Brothers is engaged as securities dealers or own property in Europe and make $8,000,000.00 on that property. The question is, does Meyers Brothers -- can they make a profit that isn't confiscatory in this Chatham Center operation that they operate in Pittsburgh? I don't care what their other business is.

THE COURT: If Meyers Brothers is operating in Pittsburgh they certainly should have adequate records to show what their income is from that business and their disbursements.

MR. MARKS: Absolutely, Your Honor. We will be glad to make those available.

THE COURT: All right. Make those available, and that is as far as we can go.

Does that satisfy you, Counselor?

MR. BOEHM: That satisfies me with respect to Meyers Brothers.

Now, we have the other parties.

THE COURT: The same applies to the rest of them. I can't conceive of, with there being some adequate measure of making records, how these people who have been in business for many years don't know that -- the left hand doesn't know what the right hand is doing.

MR. BOEHM: Except they needed a certain --

MR. BOREMAN: They do, Your Honor. That is why these are taken from their books. They made that determination from their books.

MR. BOEHM: It is agreed you will produce the tax returns for the others?

MR. BOREMAN: The federal tax returns you are talking about, the corporate returns, the Schedule C's

MR. BOEHM: The Schedule C's, if they are individuals, and if they are corporations, the 1101's for 1968 and 1969.

BY MR. BOEHM:

Q Mr. Buzzard, several exhibits have been introduced into evidence which you have compiled, and one of those exhibits, as I recall, was intended to show that the privately owned parking lot is unable to pass an increased parking tax onto the customer, is that right?

A No, sir.

No, it is not?

No, it is not.

Are you of that opinion?

MR. MARKS: I object to the calling for an opinion of this witness on that point. He is not testifying as an expert as to the preparing of rates. I think he has the wrong witness.

THE COURT: We will sustain your objection.

(EXCEPTION NOTED)

MR. BOEHM: I am not permitted to ask him that question. He has testified already as to one of those exhibits. The Court may have the same recollection as the witness, but I am certain with respect to one of those exhibits where they argued the objection they listed the charges made by the Parking Authority lot, do you recall, they listed the charges made by a select few of private lots. Mr. Boreman said, "This is offered in evidence to show that the increased parking tax rate can't be passed onto the consumer."

MR. BOREMAN: And he testified that he compiled them, that is all. We didn't ask his opinion.

MR. BOEHM: It is offered in evidence through this witness and his compilation to prove that point.

MR. BOREMAN: We will put on a witness who will testify to it and you can cross-examine him.

THE COURT: Answer the question, if you can.

We are getting down to rug cutting here, gentlemen, that is a lot of collateral hocus-pocus. What I want you gentlemen to shape up to is to get into the main stream of what is involved here and cut out all this silly collateral arguing over fine technicalities because I told you before you are in a court of equity. We have enough imagination to appreciate what is involved in this proceeding.

Now, let us get into the main stream.

MR. BOREMAN: Your Honor, I am not doing the objecting. I brought this compilation to help the Court.

THE COURT: We are not asking for excuses. Let us get on here. This task is difficult enough for the Court to try to separate the wheat from the chaff, let alone to have all this collateral colloquy involved in it. We will have tons of testimony here to dissolve and digest.

MR. BOREMAN: I thought we were helping the Court by making this compilation and look at all the objections we have had over it.

MR. BOEHM:

Sir, I show you what has been marked as Plaintiffs' Exhibit 6.

Would you take a look at that, please? You are familiar with it?

I am.

What does that show?

It shows a comparison of the parking rates, as I testified, of one Parking Authority garage with two of the Plaintiff-operated garages for various lengths of time during the years 1967, 1968, 1969 and 1970. That is all.

What is the purpose of this compilation?

To show the difference between the parking rates.

And it is not intended in any manner to assert that an increase in the parking tax cannot be passed on to the customer who parks his car?

MR. BOREMAN: That is objected to as asking for a conclusion of the witness.

THE COURT: Sustained.

(EXCEPTION NOTED)

MR. BOEHM:

Sir, when you made your compilation, which is marked Exhibit 1 here, did you take into consideration the fact that the various parking garages have increased their parking

rates from time to time?

A I was aware of it, yes.

Q Wasn't it one of the major factors that you considered?

A No.

Q Did you ask for any information or make any kind of a compilation with respect to the number of cars that may be parked in a particular garage, say, during the year 1968 as compared with the year 1969 or during the first six months of 1969 as compared with the first six months of 1970?

A We have some information as to that matter which I am not prepared to testify about.

Q Did you make any judgments or decisions in preparing this report other than the one that you have referred to this morning with respect to allocations for pensions and some other matters there?

A Once we had determined the format that we wanted to follow I stuck to that format and used the data that we had either obtained cooperatively from the various Plaintiffs or that they provided us as a result of our inquiry without contacting them whatsoever, and I did not interpose my judgment is any allocation or any change in what was assigned to one category or another.

Q How did you make that decision that you were talking about this morning with respect to allocation? You said you did it

is a logical manner, as I recall.

A Well, I think I explained that. With reference to the pension fund, for instance, where a company pays a certain blanket amount into a pension fund, take for instance Alco, we took the payroll which was carried in their ledgers for a particular lot or garage and allocated the pension fund expense to that particular facility on the basis of what percentage that was of the total payroll for that corporation.

Now, with reference to group insurance -- not group insurance but general insurance, we allocated that on the basis of the revenue for the particular facility or to the total revenue of the corporation, and it was always on one of those two bases that these general items were allocated, either revenue or wages.

Q So that you made allocations in the case of pensions and group insurance?

A Yes.

Q Were there any other allocations?

A General office rent where the corporation has one general office where all of the office activities are carried on, and the general office rent was allocated.

Q Do you remember doing this for Meyers Brothers?

A No, sir.

Q You didn't do it for Meyers Brothers?

A No, sir.

Q Why was that?

A Because we had no information from them that there was general office rent --

Q I meant, let us take the allocation of pensions, for example, did you do that for Meyers Brothers?

A We had no information from Meyers Brothers. As a matter of fact, they submitted the data only for one of their operations, and that was the Chatham Center, and that was detailed by them in complete detail. I made no change in what they submitted whatsoever.

Q Are you saying you didn't take into consideration the fact of pensions in computing the operating expenses of Meyers Brothers?

A I made no allocations whatsoever in connection with Meyers Brothers. They submitted a complete breakdown which I took in toto for the Chatham Center Garage.

Q And you have no idea of any further detailed breakdown than what was submitted to you by them?

A No, sir.

Q If you don't know what went into these figures --

MR. BOEHM: Your Honor, I can't very well cross-examine. That is the handicap I have. He

doesn't know what went into those figures, so I can't ask him about them.

THE COURT: That is good logic.

MR. BOEHM: He shouldn't be on the stand, really. I should be questioning the people who know the answers to the questions.

MR. BOREMAN: Now, Your Honor, I thought we had gone all over this and I thought Your Honor had admitted this as an exhibit, and now Your Honor has spoken to me about delaying it. It seems to me we have gone past this question now. I don't understand this. The whole purpose of Mr. Buzzard is to say that he took these figures from the books and for the convenience of this Court gave a summary of the income and expenses. He has testified to that. What is all this, as Your Honor said before, colloquy back and forth.

THE COURT: At this time we are going to take a recess.

(Recess taken.)

MR. BOREMAN: If the Court please, pursuant to the Court's request counsel for the City and myself got together over the recess. Counsel for the City has requested we produce tax returns for

the Plaintiffs of the years 1968 and 1969 which we have said we will produce. I would like counsel for the Defendant to state whether there is anything further he would like us to produce.

MR. BOEHM: Nothing further.

BY MR. BOEHM:

Q Mr. Buzzard, with respect to some of the other parties to this case other than Meyers Brothers, did you take into consideration pension expenses in figuring your management and labor costs?

A You mean in allocating it?

Q Yes.

A No, sir, because they provided the information with reference to the pension fund if there was any for each of their specific individual operations. The only ones that we made allocations for was William Penn Parking, Alco Parking.

Q What was the first one?

A William Penn Parking lot, Alco Parking. That's all, those two

Q Other than those allocations, are you saying what you really did in compiling this report was to create these categories that you have set up (indicating) here, like "Operating Expense," and then break that down, and so on and so forth, as you went (indicating) here; you have decided they would be significant factors and then asked the various corporation

to supply you the figures and you put the figures in there and put the book together, is that right?

A In essence, that is correct. We gave them forms similar to those forms, had them fill the data in.

Q And then they sent the forms back to you?

A Yes.

Q And you put them on the sheets and put them together in this book?

A That's correct.

Q Now, when you made these allocations with respect to William Penn and Alco, how did you calculate the number of employees? What number of employees did you use, the total number of employees employed by that corporation or something other than the total number?

A We didn't use the number of employees at all, we used payroll.

Q You took the total amount of your payroll?

A For a given garage or facility and used that payroll figure as a percentage of the total payroll for that corporation and partnership.

Q So if the payroll of one garage were $25,000.00 and the total pension expense was $1,000,000.00, you used those two figures in deciding what portion of the $1,000,000.00 should be attributable to that particular garage, the same

relation the $25,000.00 bears to $1,000,000.00, right?

A If the total payroll was $1,000,000.00, not the total pension expense, if the total payroll was $1,000,000.00 and for a given lot it was $100,000.00, then we would take ten per cent of the pension fund, maybe the pension fund was only $5,000.00, but we put ten per cent of it onto that lot that had a $100,000.00 payroll.

Q And that is the way you did it with respect to --

A Right.

Q You don't know, do you, Mr. Buzzard, anything about the terms of a contract that was negotiated between labor and management with respect to the parking garages, how that was effected or when it might have taken place with respect to the total figures you have here?

A Only with respect to wages and the wage increases that took place.

Q Did you know any of the details of those wage increases?

A Yes, I testified to that, that in 1969 the wage increase was 25 cents per hour.

Q For what corporation, all of them?

A This is a blanket contract.

Q I see.

A It covers the whole parking --

Q In 1969 there was a wage increase of 25 cents an hour?

A Yes, which brought the wage rate up, two forty. August 1, 1970 -- that wage rate in 1969 was August 1, 1969. There was a further increase August 1, 1970 of 15 cents an hour on garage attendants only.

Q Now, is that the figure that is represented under "Wages and Salaries" in your "Management and Labor Costs"?

A Yes.

Q Is that all that it includes or are there other, for example, management wages or salaries included there?

A As I said, there are some other employees in there such as cashiers, janitors, where the operation is large enough to have such employees.

Q How about the officers of the corporation, they receive a salary, don't they?

A The information that I received was that this did not include officers' salaries. This included --

Q Officers' salaries are not included in your costs at all in this report?

A That's right.

Q Do you know any of the details of increases in the parking rates during the years 1969 and 1970?

A The rates are included in this (indicating) book for each company and when the rate was effective on each lot.

I forgot to mention that when I was explaining the

contents of the book. But after each of the salaries of detailed individual sheets you will see sheets of the rates that are presently effective and the date that they became effective for each facility.

Q Can you tell me, for example, with respect to the Alco Parking Corporation looking at your report whether or not their rate changed subsequent to December 31, 1969?

A Well, I can't tell from the report, but I know that the rates did not change subsequent to December, 1969.

Q The report doesn't indicate whether or not the rates have changed subsequent to December 31, 1969. Can we find out that information from looking at the report with respect to any of these corporations?

A In practically every instance it will indicate that the rates did not change after December 31, 1969 except in those cases involving the Parking Authority garages where their rates changed February 1, 1970.

Q For example, look at Alco Parking Corporation, which is first. I guess they really got an alphabetical disadvantage there. We have been working them over pretty good.

Do you see the sheet on Alco?

A Yes.

Q Allegheny Center Garage is the one I am looking at, for example. That, I had thought, was not supposed to be

included.

MR. BOREMAN: It was because we originally included it and took it out. We didn't change that page.

BY MR. BOEHM:

Q I notice the rates did increase for Allegheny County Center Garage.

A Those rates are established by the Parking Authority.

Q Look at the next page. On the next page you have Greyhound Garage, February 1, 1969 rates. Where are the February 1, 1970 rates for the Greyhound Garage?

A If you will look at the caption of the thing it says "Rates Presently in Effect."

Q On the one I am looking at it says "Rates effective February 1, 1969."

A Go the back to the first page of the Alco Parking Corporation rates presently in effect. That means the whole business.

Q Is it correct to say that the rates that you have in your report are only the rates that are presently in effect? Is that all you have included there?

A Yes, sir.

Q So that you can't tell at all by looking at this report whether or not there has been an increase at any time in the

rates?

A Any time since when? Sure, there was increases in the rates within the last three or four years.

Q Does the report tell us that?

A It does not.

Q Is it correct to say all you can tell from looking at this report is what the present rates are?

A And how long they have been in effect.

Q And how long they have been in effect.

But we don't know what the figure was before it was changed to what the present rate is?

A Not from this report.

Q Do you have that information, sir? Did you take that information into consideration in preparing this report?

A We have the information, but I didn't take it into consideration.

MR. BOREMAN: If the Court please, the parking operators are going to testify and they can give his all that information.

MR. BOEHM: He has answered my question.

BY MR. BOEHM:

Q Mr. Buzzard, is there any indication in Exhibit 1 which you compiled of the parties' investment in each of these businesses?

No, sir.

MR. BOEHM: That will be all. Thank you, sir.

MR. BOREMAN: I have some redirect questions.

- - -

REDIRECT EXAMINATION

BY MR. BOREMAN:

Mr. Buzzard, with reference to the last question of Mr. Boehm, you didn't take into consideration any investment of the parties in any of these garages, did you?

No, sir.

And if there would be an investment that would be an extra charge against income, wouldn't it?

MR. BOEHM: That would be what?

MR. BOREMAN: An extra charge against income.

MR. BOEHM: I object to the question as leading his witness.

MR. BOREMAN: I think I have a right to show there would be less income and more loss and less profit.

BY MR. BOREMAN:

In other words, you left out any charge for investment, didn't you?

I only put in such charges as they gave me which might be charges on investment such as interest and amortization in

a few cases.

Q Mr. Buzzard, Mr. McNeil designated you as part of his staff to make this survey and make up this report, did he not?

A He did.

Q Did he instruct you to leave out any operation?

A He did not.

Q Did any of the Plaintiffs whose reports you covered there instruct you to leave out any operation?

A No, sir.

Q Did I ever instruct you to leave out any operation?

A No, sir.

Q Now, then, what is the total number of operations in that book?

A I think it's 57 or 59.

Q As a matter of fact, I think you misspoke yourself. I did tell you to leave out Allegheny Center, didn't I?

A That was just the other day.

Q You originally put in Allegheny Center, didn't you?

A Yes, I did.

Q And I told you to leave it out, didn't I?

A Yes, sir.

Q Why did I tell you to leave it out?

MR. BOEHM: I object to that question.

MR. BOREMAN: I think it is a fair question,

Your Honor. He is trying to --

MR. BOEHM: He can't tell what your intention was. You can tell us.

MR. BOREMAN: I want to show why.

THE WITNESS: The loss being so great distorted the overall results for the Alco Corporation, and the matter of the adjustment of the rental which was causing the extremely great amount of loss was a matter that was still under adjustment.

MR. BOREMAN:

And so, therefore, what was the reason you left it out?

Because it distorted the picture so badly.

In what respect, in the respect of making a high profit or a big loss?

Because of the very high loss which has been shown is between two and three hundred thousand dollars a year.

(Plaintiffs' Exhibit No. 10 was marked for the purpose of identification.)

MR. BOREMAN: I want to show Allegheny Center was left out because of this huge loss, and we thought it distorted the picture and left it out, not because we are trying to cover up any pictures.

MR. BOEHM: Are you going to show the same thing with respect to the others that are left out?

MR. BOREMAN: I am going to question him as to why they were left out. I don't have the other statements.

MR. BOLHM: I have no objection.

THE COURT: Very well, we will admit it.

(Plaintiffs' Exhibit No. 10 was received in evidence.)

MR. BOREMAN: I offer in evidence Plaintiffs' Exhibit 10 being a statement of operations of Allegheny Center for the years 1968 and 1969 prepared by J. K. Lazzer, certified public accountant

BY MR. BOREMAN:

Q Why did you leave out the William Penn loss of the Roosevelt Hotel?

A On account of the fact that it had been a large parking lot and through a disposal of some of the property had become a very small operation or a comparatively small operation, and you couldn't compare one year with the other and you couldn't make any projection.

Q So it was left out because it wouldn't be relevant or pertinent or fair, is that correct?

A That's right.

MR. BOLHM: I object to the leading question.

BY MR. BOREMAN:

Now, this University facility that Meyers Brothers operate, that is a Parking Authority facility, isn't it?

Yes, it is.

Why did you leave that out?

In the first place, we didn't get any figures from Meyers Brothers on it, and in the second place, it is operated under a management fee where it isn't a matter of profits and loss.

How about the Carlton House?

Same thing. It's operated under a management fee and the operator does not even collect the revenues.

So in these four instances there was a specific reason for leaving it out, was there not?

That's right.

And was it left out for any purpose of hiding the true income figures of this survey?

Not in the least.

You said in making this study in making up this booklet you had forms printed with the pertinent data that shows on those forms. Did you simply send the forms to the people and wait for them to come back, or did you go to their office and go over their records with their accountants?

Well, in the one case, I went to their office.

In which case?

A That was the case of the Liberty Parking, and their accountant is a man by the name of Robinson and he's with a firm I can't think of the name of. There are three names out in the G. B. U. Building out at the corner of Route 51 and Brownsville Road. And I went over the forms with him, and he said that he couldn't give me the information right then but he would take the forms and go through their books and their records and provide the information for me and send the material in, which he did. I got the material back in about two weeks. I did not see their records.

Q In other words, they were furnished to you by the company's accountant?

A That's right.

Q How about the Stabile operations, did you go to their offices?

A I went to their offices many days.

Q With whom?

A With Mr. Cassidy, their accountant.

Q How about the Shepard operations, Stanwix Auto Park, and so forth?

A I went to their office on only two occasions. We came to an understanding as to the data that we wanted. I did not give them the forms which I mentioned to you in the first

place because at that time I hadn't had the forms printed, but they sent me substantially the same information in each case from which I transferred the information.

It was sent to you from their books and records and their bookkeeping people?

Exactly.

Did any of these Plaintiffs, to your knowledge, hold back any records or fail to give you any records that were pertinent to this determination?

No, sir.

When you were instructed by Mr. McNeil to compile these statistics, did he tell you that he wanted any specific answers showing profit or loss?

No, sir. He just said, "Get the data and put it together."

Did I tell you that I wanted you to compile statistics which would show a loss rather than profit or vice versa?

No, sir.

In other words, when you embarked on this word and completed it you had no instructions any way as to what the result should be or ought to be, or anything?

No such instructions whatever.

And you made the survey independently from the books and records furnished to you?

Exactly.

Q Now, in the making of this Exhibit 1, you testified before that you did not consider federal or state income taxes, is that right?

A That's right.

Q So that these net income figures, whatever they show, would be net income on which the federal or state tax would then be taken?

A That's right, and we so named it in operating income --

MR. BOEHM: I would like to object to the last question and ask that it be stricken. He is not competent to testify to that. He couldn't ask the other questions I asked him that weren't set forth in that record. He didn't know anything about tax records when I asked him.

MR. BOREMAN: He testified that he does not show federal and state income taxes.

MR. BOEHM: The last question that you asked him is what I have objection to.

MR. BOREMAN: I am saying these are the net income figures before any federal or state taxes are taken off them.

MR. BOEHM: Are they or aren't they?

BY MR. BOREMAN:

Q Well, answer.

MR. BOEHM: Does he know?

THE COURT: Answer if you know.

THE WITNESS: I know that they are the operating income before any federal or state income tax.

BY MR. BOREMAN:

Q There was a reference, Mr. Buzzard, about these allocations you made.

Would you say that the items that you had to get allocations on were major items in expense or minor items?

A I said they were minor items of expense.

Q Could you give us an estimate of what percentage of the total expenses these items comprised, an estimate? Would it be 25 per cent, 50 per cent, 5 per cent, or what?

A I would say it would be on the order of five per cent, at the most, of the total operating expense.

Q So that even if they were not precisely accurate they would affect this computation to the extent that they comprise five per cent of the expense items at the most?

A That's right.

Q As far as the rental figures and the computation of the parking tax when you made the computation and salaries and wages, would you say they are major figures?

A They are the major figures.

Q Would you say that they are correct?

A They are very accurate.

Q They are not allocations?

A They are not allocations.

Q Would you say that in allocating these expenses you were conservative or liberal with these expenses?

A Well, the only one that I would say that I was conservative on would be the increase in the wages of salaries. The other ones I would say were exactly calculated.

Q The wages that you thought you were conservative on, they could have been higher?

A By applying over the eight per cent figure when actually the increase figured out to be somewhere -- well, it was 9.7 per cent.

Q And in certain cases where you carried over the same expense you didn't take into consideration their might have been an increase in those expenses?

A I did not. We had no way of knowing whether there might be an increase or not.

Q And the revenue projection of 1970 was on a mathematical basis based on the 1969 results, is that right?

A Based on the actual first six months.

Q And using the proportion of 1969 between the first six months and the last six months?

That is right.

Now, the scope of your employment was to prepare Exhibit 1 to show the operating revenue expense, expenses, net profit and loss and percentage figures of the parking operations only, is that right?

MR. BOEHM: I object to the question, Your Honor. Why can't Mr. Boreman say, "What was the scope of your employment," instead of telling him what the answer was.

THE COURT: We sustain the objection. Rephrase it.

(EXCEPTION NOTED)

MR. BOREMAN:

Will you tell us what the scope of your employment was in making this report?

I think I have already done it, but I'll do it over again.

I was directed to prepare a revenue and expense statement for each individual facility of the various Plaintiffs in this case. That was number one. Number two, from -- and to make a projection as to what the 1970 results would be in the way of revenue and operating expense and using that as a basis to prepare a summary for each plaintiff showing the individual figures and a total for his operation for 1968 and for 1969 and to project what the results

would have been in 1969 had the tax remained at 10 per cent and for 1970 to project what the result would have been, either profit or loss, if the tax had remained at 15 per cent or at 10 per cent and to show in addition the present parking rates presently in effect for the various individual facilities of the Plaintiffs.

MR. BOREMAN: I have no further questions.

- - -

RECROSS-EXAMINATION

BY MR. BOEHM:

Q Did you have any idea why this study was requested, Mr. Buzzard?

A Certainly.

Q You knew that these parties were contesting the validity of the parking tax, didn't you?

A I certainly did.

Q You knew a suit had been filed and Mr. Boreman was representing them?

A I certainly did.

Q You also knew the information you were compiling was important to them for the purpose of testimony in that case?

A I certainly did.

Q And the purpose of that testimony would be to show that the increase in the parking rates actually put them in a loss

position to a serious extent?

A I had no idea as to how the case was to be presented. The scope of my activity was such as I had just described it. Anything from there on would be conjecture on my part as to how the attorneys were going to present that material.

Q Did you realize that the purpose of your work was to show that the increase in the parking tax was placing a heavy burden on the parties to this case, heavy financial burden?

A That wasn't the purpose that I was given --

Q Did you realize that, sir?

A I realized it as I went along, couldn't help it. Anybody would have to be -- be very stupid not to realize that from the results that came out of it.

Q And you were apparently either conservative or liberal on some aspects of preparing the report, right?

A No, sir.

Q You weren't?

A I was not. I was conservative on the wage issue only for a reason, that the wage and salaries did, I know, include some cashiers and other employees who were not included in the blanket wage increase so that I couldn't logically increase the wages and salaries by the complete 9.7 per cent. So to be on the safe and conservative side I used only the 8 per cent.

Now, to that extent I was conservative. Otherwise there was no conservatism or liberalism in any other respect. The figures that I received were put down just as I received them.

MR. BOEHM: That is all I have. Thank you.

MR. BOREMAN: Just one question.

- - -

REDIRECT EXAMINATION

BY MR. BOREMAN:

Q Mr. Buzzard, when was it first brought to your knowledge that these figures would show a very serious loss and drop in the profit of the parking operators in the course of making this study?

A I didn't get the first part of your question.

Q When did you first come to the conclusion, as you said, that these figures would show a serious loss or drop in the profit of these parking operators in the course of making the study?

A I think I wasn't engaged in it for more than a couple of days until I realized that.

Q Did I ever state to you that if the picture showed a profit or no particular loss that we couldn't use the survey?

A No, sir.

MR. BOREMAN: That is all, Your Honor.

THE COURT: We will adjourn until tomorrow morning and get started here promptly at a quarter past nine.

(Whereupon, the hearing was adjourned.)

- - -

SEPTEMBER 16, 1970
Wednesday Morning Session

- - -

HARRY W. SHEPARD, JR., recalled as a witness on behalf of the Plaintiffs, having been previously duly sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Continued)

BY MR. BOREMAN:

Q Mr. Shepard, I believe you testified that you were also the manager of the Parking Authority facility that is leased to Horne's and also one leased to Gimbels?

A That's correct.

Q Is that correct?

A Yes, sir.

Q Would you make a comparison of the Parking Authority facility as far as its operation is concerned with your privately operated facilities?

A Outside of ownership and the way they are financed, they are exactly the same. Each one differs slightly because of location, because of demand, but the function is the same.

Q Do the employees both have unions?

A Yes. We deal with exactly the same union, both have unions.

We handle a single payroll breaking the operation down with the employees. The employees are interchangeable.

They are in the same categories?

Exactly the same categories.

You are saying as manager of Horne's and Gimbels and as operator of your own private facility the employees interchange?

Yes, indeed they do.

You have one payroll?

Yes, sir.

What about the wage rates?

Wage rates are exactly the same. There is a general master contract for all parking employees in the City. It's negotiated with the Teamsters' Union.

Is there any difference in the number of employees with respect to the size of the facilities?

Not necessarily. The major garages are self-park facilities, they all have essentially the same number of employees. They have the same number of cashiers, parking attendants, each one has a manager. The problems are basically exactly the same.

And the size of the facilities, what about that?

They are comparable sizes. My private garage has about six hundred odd spaces, the Authority garage at Gimbels has 605,

the Horne's garage recently added 300 spaces which would make it about 900. That's the one that competes directly with me.

Q What about the cost of erecting these facilities, are they comparable? Would there be any difference?

A The construction rates are changing so fast that I would assume that if you built two garages today they wouldn't be the same price.

Q Is there any reason for the difference in cost in building a Parking Authority garage and building a private garage?

A Well, privately you have a parking operator or someone familiar with the parking business who is educating the architect as to how to put the building up, and perhaps I could build it a little less expensive than the Parking Authority, which is basically a committee form of building. This gets a little more expensive. Really there should be no difference in the cost. The garage itself is the same way. Most of them are reinforced concrete construction. The site, the actual building site, may change the cost of it. Essentially they are the same type building.

Q Except for the financing of the operation is there any difference between the private and public parking?

A I would say no. Financing is one of the most difficult things we have to overcome. The Parking Authority can issue

tax-free bonds and, therefore, enjoy an interest rate at about half of what a private individual would have to pay. They have extended terms of financing up to 40 years.

The private operator pays two points or more above the prime rate and can finance for not more than, say, 22 to 25 years. This essentially doubles the cost of financing the facility.

Q How about real estate taxes?

A Real estate taxes are a very interesting situation. The private parking operator pays County taxes, school taxes and City taxes. The Parking Authority is free from all taxes, and any taxes it pays I think are voluntary.

MR. BOEHM: Do you mean all real estate taxes?

THE WITNESS: I'm not an attorney, of course, but I feel quite certain that the legislature granted them tax exemption from all taxes.

BY MR. BOREMAN:

Q I asked you about real estate taxes.

A Yes, sir, we pay heavy real estate taxes because of high assessments.

Q And the Parking Authority is exempt?

A The Parking Authority is exempt from all real estate taxes.

Q As a parking operator of both the public Authority garages and as a private operator of your own parking garages, is there any difference in the public services that might be required between the Authority garages and your private garages?

A No, sir.

Q Do your private garages require more police protection?

A No, sir. As a matter of fact, we require, all parking garages require, less police protection.

Q Does your private garage require any police protection other than the normal police service given in the City to everybody?

A No, it does not.

Q Are there any extra policemen stationed in front of your garages to direct traffic?

A No, sir.

Q Has there ever been one?

A Many years ago there was at a time when there was no parking in the City. There was quite a large amount of congestion and we had to keep the street open so that we could get cars into the garage.

Q You say many years ago.

Do you mean before the Parking Authority was established?

A Yes. This would be dating to 1947, '48, in that area.

Q How about in the 1960's?

A There's no problem now at all.

Q Any difficulty or congestion of getting in and out of your garage?

A Only because of the busses in the street that block my entrance or exit.

Q What does that do?

A That creates congestion inside my garage.

Q Inside your garage?

A Yes, sir.

Q In other words, cars are lined up inside your garage?

A Oh, sometimes to the top of the building.

Q Are they lined up on the street?

A No, sir, not because of the garage. The traffic pattern creates that.

Q I mean cars that are parking in your garage, are they lined up in the street?

A No, sir. There are no cars lined up in the street either to get in or out of my garage.

Q Mr. Shepard, who supplied the records and the books from which Mr. Buzzard made his compilation?

A My accountant, Mr. Frank Benke, who is a certified public accountant and works for the firm of Cohen and Horovitz.

Q Can you certify now that the figures contained in Exhibit 1 are a true and accurate reflection of your books and records?

A Yes, sir.

Q Mr. Shepard, referring to Exhibit 1, and your portion of Exhibit 1, Stanwix Auto Park, will you tell us how you account for the reduction in net profit in each of the years 1968, 1969 and the projection of 1970? What factors caused that?

MR. BOEHM: I object to the question, Your Honor, because Exhibit 1 doesn't contain any figures for net profit. I asked that question yesterday and the answer was no. There are no net profit figures in Exhibit 1.

MR. BOREMAN: I am referring to the net profit or loss figures on the parking operation in Exhibit 1.

THE COURT: Do you mean in the summary sheet (indicating) here?

MR. BOEHM: They are not supposed to be there. I don't know, are they?

MR. BOREMAN: It is the figure of operating income and on the individual sheets operating income or loss. I am referring to

what is the cause of the operating income results in each of the locations.

MR. BOLHM: That is different.

THE WITNESS: It's entirely because of the parking tax.

MR. BOREMAN:

Why do you say that?

We've had increases in operating revenues, gross receipts have gone up, other factors have been relatively stationary. As you can see, even wages, which is one of the larger parts of the operating expense figures, have gone up a relatively small amount, percentagewise, as compared to the operating income. The parking tax has gone up over 100 per cent since it's been first instituted and takes the largest share out of our operating income. As a matter of fact, as far as the parking tax is concerned, it doesn't make any difference whether you are making money or losing money, this thing comes right off the top. If you are not doing any business you may have a chance to reduce your employees, you have no chance to reduce the parking tax. With the federal income tax at least you have to make a dollar before you pay any.

You have indicated that the gross revenue -- that is with respect to Stanwix Garage?

A Yes, sir.

Q How about these lots, First Avenue lot --

A You have essentially the same thing would apply to those. The effect on the loss is largely due to the parking tax.

Q What do you mean by that?

A I mean the parking tax is taking 20 per cent of the gross receipts of the operation before one dime can be paid to our employees, can be paid as rent or can be paid for any other maintenance purpose of the facility, and if you don't pay it on time they put penalties and interest on you. At least some of your creditors you can stall off.

Q You have been in the parking business, you have testified, since 1937, I believe?

A Yes, sir.

Q And you have already given us your background, and you are familiar with the parking industry. As a parking operator in your own individual operations, what would you expect to earn as a fair return on your operations?

MR. BOEHM: I object to the question, Your Honor. It is irrelevant, incompetent and immaterial.

MR. BOREMAN: A question of confiscation Your Honor. He is the owner, he has a right to say what he would expect as to a return.

MR. BOEHM: The objection is to the fact of this man's expectations of a fair return.

THE COURT: Yes, expectations. You are getting into the realm of conjecture, Counselor

MR. BOREMAN: No, Your Honor. What I am questioning here is that he is an operator and as an operator and based on his previous experiences in this whole industry what would he require to go into the parking business. In other words, if he were to make one per cent or three per cent or five per cent he might not go in the business; if he would make fifteen per cent he would.

THE COURT: We recommend you put this question to the witness: "What is the normal and usual rate of return on the investment?"

MR. BOREMAN:

What is the normal and usual rate of return on this business? I thought I had put it in a personal way. I would like to see a ten to twelve per cent return as a minimum, and it's quite obvious that that would be a silly thing right now when you are suddenly faced with a twenty per cent tax.

Why is that, can you explain that in more detail?

A At this point it would be silly to go into the parking business for a ten to twelve per cent return when for no risk at all you can buy U. S. Government Bonds that pay seven per cent or eight per cent or Telephone Bonds. There is no reason to go into a business that involves risk if you can get the same thing from something that involves no risk.

Q You are referring to investing your own money?

A I'm always investing my own money.

Q How about if you take a lease, if you don't have the capital investment in a structure.

A You are accomplishing the same situation when you take on a lease. If you have to pay $1,000.00 a month for a lot for a period of ten years, you are obligating yourself to $120,000.00 and you are entitled to some protection on that risk. There is no reason in the world why I should sign my name and guarantee to pay $120,000.00 unless I have some protection, and I don't like to see it taken away from me.

Q What do you say, then, is the normal rate of return of the parking operation?

A I would say twelve per cent, ten to twelve per cent.

Q Ten to twelve per cent?

A Yes, sir. That would be the minimum, sir. Naturally, in

any business you try to make more money, the most money you possibly can.

Of course, when you say the ten to twelve per cent, that means a net income on which you have to pay federal taxes from it?

Yes, sir, I'm afraid so. That is the case. When you talk about net income you talk about net income before federal taxes, because they say the federal tax, you have to make it before you pay it, you can't anticipate it.

Mr. Shepard, referring again to Plaintiffs' Exhibit 1, the Stanwix Auto Park section, what did that operating income show for 1968?

$13,057.

I mean the percentage of return.

15.3 per cent.

What was the tax rate then?

The tax rate was ten per cent.

And in 1969 what does that show?

7.6 per cent for a tax rate of 15 per cent.

THE COURT: Tax rate of what?

THE WITNESS: Fifteen per cent, sir.

MR. BOREMAN:

And in 1970, the projection, what does that show?

A return of 4.1 per cent, parking tax of 20 per cent.

Q And for the totals of all your facilities, privately owned, what does it show for 1968?

A 12.2 per cent.

Q And for 1969?

A 2.3 per cent.

Q And for the 1970 projection?

A We show a loss in that case.

Q That result seems to be due in part to one of your lots showing a zero return in all the years. How do you account for that?

A Very easily. I made an error of judgment in projecting the income. It's one of the risks of going into this business that you face.

Q Are you under lease in that operation?

A Yes, sir. We have a lease in that operation.

Q Now, referring again to Plaintiffs' Exhibit 1 and the projection for your operation in 1970, how would you characterize the gross revenue projection in there, high or low?

A I would say that the gross revenue projection is high.

Q Why?

A Well, taking everything into consideration; one, there will be a certain increase, we've already seen that, in your night business because of the stadium. This, of

course, will be greatly reduced as soon as the parking lots are completed around the stadium. However, at the same time, there have been -- there has been a large shopping mall opened in Monroeville, another one opened in Rochester, Pennsylvania. All of these things directly affect the business downtown. The population of the City of Pittsburgh is declining, the population in Allegheny County is stable. The only place that these people -- the shopping malls can do business is to take customers away from somewhere else, so they must take them away from downtown. These are the kind of things you think about when you try to develop a parking facility. The trend should be down. And I think -- most anyone will agree with me. If this was a growing city of growing area, why, there would be some validity to an argument of maybe we don't know whether it's going to go up or down.

Q You said the projection for the Stanwix Garage is high. I see there is an increase of $17,000.00 in 1969 of gross revenue. Do you think that's high?

A I would say it's high when you are talking about a half million dollars of income.

Well, take for example, if they have to repair the street out in front of my garage it's way high. This is, again, one of the risks that you take in this business.

If we have snow a little earlier this year, again that income will drop. An early snowstorm can cost you $1,000.00 in income.

Q Now, Mr. Shepard, what can you tell us with respect to your ability to sell your business if you wanted to sell it? What would be the situation?

A I doubt that I could sell the business for anywhere near what the mortgage is on it now.

Q Why?

A It doesn't show any income. A 4.1 per cent return wouldn't attract anybody. Today, as I said, you can get a fine return on bonds, seven, seven and a half per cent. Why should anybody invest in a parking facility? Before the parking tax unquestionable. Without the parking tax you have a very valuable property.

Q Can you cancel any leases you have?

A I can't cancel any leases. I can go to the owner of the property and say, "Please let me off the hook."

He doesn't have to, though, and in many cases will not.

Q On these lots that you have, how long are the leases, can you tell us?

A Fortunately, the leases are about to run out. I have a one-year lease on the First Avenue lot, a lease that will run out at the end of this year and then go on a month-to-

month basis.

The Quick Park Park Lot on Fourth Avenue has two more years to go, and it is renewable. I have a chance to change the terms on that one. The only thing that happens there is it reduces the return to the landlord, the parking tax -- if it doesn't take it away from me it takes it away from the landlord.

If you reduce the terms of the lease, then you could make a profit or a fair profit in operating the parking lot?

Yes. That's possible if I can reduce my lease equivalent to the amount of the parking tax.

If the landlord will agree to it?

If the landlord will agree to it.

On the other hand, that lot could turn over to become a captive lot of some office building where they offer free parking to the tenants, and in that case they write the cost of the lot into the lease and pay no parking tax.

What do you intend to do with these leases that are running out? Are you going to renew them?

I certainly would not renew any lease that wouldn't give me a fair return. My time is -- if the parking business was as easy as some people think, anybody could get into it and anybody could walk in and operate a parking lot. They don't.

Are you stating that unless you can get some adjustment that would enable you to make what you call a fair profit you wouldn't renew the leases?

That's correct.

You mentioned about operating a parking lot. What does it take for an owner such as yourself to operate a parking lot? What do you have to know and do?

Oh, my. Well, in the first place you've got to be -- You have to be an economist, whether you graduate or not. You have to be able to project your income, expenses, you have to be able to project all of the costs of operation you have. You have to be able to predict what the trend in the City will be if you become involved in the construction of a parking facility. If you build a garage you have to be a complete building manager, you have to be able to educate the architect because architects are not parking people. You have to tell them how to build the garage, then you have to ride herd on the costs of building it. You've got to be a labor negotiator, and I think everybody knows here the Teamsters' Union is not the easiest union to negotiate with. You have to be a father confessor to your employees. They look up to you and you have to get into their personal problems. You have to deal with the public, which is one of the most

difficult things to deal with. When something happens to a person's automobile you have to be able to treat them diplomatically, handle insurance claims, if it's an insurable one, and passify them if it's their fault and you are not responsible. You have to negotiate with the insurance companies because everybody is out to protect themselves. You have to negotiate insurance rates. You have to negotiate the insurance claims. You must consult with attorneys, you must appear before City Council when they try to pass a dishonest parking tax. You must appear in court and defend yourself. You have a complete maintenance program to look after. You have to repair cracks in the building, see that you can't be charged with negligence with the public entering and leaving your property all the time. You have to deal -- since we deal largely with shoppers, we handle women mostly in the Stanwix facility. They can be very unreasonable. You have to be able to hire managers that can look after things in your absence and you don't have much absence.

The parking business is a very personal business and you are at it ten, twelve, fourteen hours a day. And sure enough the day you leave on a vacation something will happen that you either have to come back or devote some time to it. I'm sure I've left out a hundred things, but

this is --

Q It isn't just a question of directing a car to a stall and collecting the ticket, is it?

A If it was, anybody could get into the business and be in the business. I wish they were now.

Q You mentioned about leases that are expiring on the lots. The Stanwix Garage, that is your own building, isn't it?

A Yes, sir. It's owned by a corporation which I control.

Q And you are the lessee?

A Yes, sir.

Q Can't you negotiate that lease so that you can make a profit on the parking operation? What happens then?

A Then the Stanwix Parking, Inc. loses money. They both lose money on the present operation with the tax as it stands.

Q Could you refinance?

A Oh, it would be impossible to refinance today because this present garage, the Stanwix Parking, Incorporated, is just barely turning a profit on this particular operation at this time. And this is with a five and three-quarter per cent interest, twenty-three year loan. Today you could not renegotiate the financing on the thing at under ten per cent interest and a fifteen-year financing period, and very likely you'd have to pay points which is an inducement

for somebody to give you the mortgage.

Is that why you can't refinance it, or does it have anything to do with the parking operation?

Beg your pardon?

Is that why you can't refinance it, or does it have anything to do with the parking operation?

Of course, it has something to do with the parking operation. If the parking operation was throwing off a lot of cash or earning a large profit, then perhaps it could be refinanced at a longer period; but it's not doing that, and there is the threat of even higher taxes. Mr. Kuhn in City Council said they ought to be 50 per cent. Several of the other members of Council said it ought to be 33-1/3 per cent. A lender would be out of his mind to renegotiate a mortgage under circumstances such as that.

MR. BOEHM: I think you ought to strike the hearsay from the record, Judge.

THE WITNESS: I don't know what hearsay is.

MR. BOEHM: It is your testimony as to what somebody else said.

THE COURT: It is not relevant for the purposes of probative evidence, what somebody else has said, or what your thoughts are as

to what you think it should be. We are concerned about what is at issue before the Court, not what you think would be the ideal situation. What we have at the present time, the basis of your complaint, that is what we are concerned about.

Now, as to the headache that you have in the operation of your business, I am sure you were aware of that before you got into the business or at least shortly after you got into it; and that, too, is irrelevant insofar as this case is concerned.

The issue here, as we understand it, is that the parking tax that City Council has passed by ordinance insofar as the private parking business is concerned has proven to be confiscatory insofar as your motis operendi is concerned because, according to your position, as I understand it, it cuts down on your overall income, your return on the business; and the tax, as I understand it, is based on the gross receipts rather than the net, and that that is taken off the top before your operating expenses come out.

THE WITNESS: That is right.

THE COURT: Now, those are the things that we are concerned about in this.

MR. BOREMAN: I just wanted to point out, Your Honor, that confiscation is only half the issue. There is the other issue of discrimination.

THE COURT: I understand that. That is what I am trying to get across to Mr. Shepard here as to what is in issue in this case. We are not concerned about what Joe Blow said or his sentiments on it or the ideal situation. What we want to know is, what is it now, the factual situation.

MR. BOEHM: Judge, will the record note that my motion to strike the statements made by the City Council members is granted?

THE COURT: It is granted and the sentences will be stricken with respect to City Council.

(EXCEPTION NOTED)

MR. BOREMAN:

I have one more question. . Shepard.

You are famili. with the business privilege tax in

Pittsburgh, and you pay that tax, do you not?

A Yes, sir.

Q You made a calculation as to what your operation would pay, percentagewise, with all other businesses that pay the business privilege tax?

A Yes, sir. We pay for the privilege of doing business in the City of Pittsburgh forty-four and a third times more than any other business.

Q That is a calculation made on what basis?

A The business privilege tax is six mills, the parking industry pays 206 mills. Then you divide the six mills into 206, and you come out to forty-four and a third times the tax of any other business.

- - -

CROSS-EXAMINATION

BY MR. BOEHM:

Q The 206 mills is arrived at by multiplying your 20 per cent by 10 which gives you your 200 and the business privilege is 6?

A Right.

Q You as part of the Stanwix Auto Park portion of Exhibit 1 operate the Stanwix Garage which you own, right?

A Yes, sir.

Q And the First Avenue lot which you do not own?

I lease from Blue Cross.

Lease from whom?

Blue Cross of Western Pennsylvania.

And the Quick Park Lot on Fourth Avenue, do you lease that one?

I lease that one from Duquesne University and Calgon Corporation. They are two separate pieces of property that are put together for one lot.

And Fort Duquesne Sixth Street Garage is one that you just manage, is that right?

That's a management contract with Joseph Horne Company. That is owned by the Public Authority of Pittsburgh.

Then we are not taking that into consideration?

I would like you to take Gimbels into consideration because I participate in the profits there. It is an Authority garage. With Gimbels I participate in the net profit as part of my -- as an incentive for management.

The Judge has made a ruling on that.

How long have you been operating the Stanwix Garage?

Well, since it was constructed, which would be about nine years ago, nine and a half years ago.

About 1961?

Yes, sir. We've been operating a parking facility on that location since about 1935. My father started operating

there as a parking lot, then we built a garage in 1947 and then tore that one down to build the present garage and office building.

Q You built the present garage in 1961.

Have you made any major improvements to the garage since 1961?

A I don't know what you mean.

Q Have you altered the structure in a major way since 1961?

A No. It's basically a garage. It has been exactly that since that time. We added an office building to the top of it and an apartment, but the garage itself has stayed the same since it was completed.

Q When did you add the office building and the apartment on top of it?

A They came about two years later.

Q This is the structure across the street from Horne's?

A Yes, sir.

Q Does your Stanwix Auto Park Corporation own the apartment and the offices that are on top?

A It does not. The apartment and the office building are a joint venture of which Stanwix Parking, Incorporated owns 50 per cent.

Q Your corporation owns 50 per cent and somebody else owns the other 50 per cent?

That's true.

Who owns the other 50 per cent?

MR. BOREMAN: That is objected to as irrelevant and immaterial. I don't see that it makes any difference in this case. He has testified that his corporation owns 50 per cent.

MR. BOEHM: It could be relevant, depending on what the answer is.

THE WITNESS: They are nobody connected --

THE COURT: We will let it in. Answer the question.

THE WITNESS: The additional 50 per cent is owned by Mellon-Stuart Company, a contractor in the City of Pittsburgh, 12-1/2 per cent by Philip and Seymour Baskin and 12-1/2 per cent by Tasso Katselas, an architect.

MR. BOEHM:

Twelve and a half, twelve and a half and what was the other?

Twenty-five per cent for Mellon-Stuart Company.

Philip and Seymour Baskin are partners in Mr. Boreman's law firm who are representing you in this case?

I don't know that.

MR. BOREMAN: I object to that, Your Honor.

THE COURT: We will sustain the objection.

(EXCEPTION NOTED)

BY MR. BOEHM:

Q Now, with respect to Stanwix, your First Avenue Lot where you lease from Blue Cross, how long have you been operating that lot?

A We have been operating that lot for -- I don't recall, four to five years.

Q Since 1965 or 1966, is that right?

A I would say -- it could be longer. I'm not familiar --

Q You are not familiar with how long you have been operating that lot?

A Yes, I am familiar with how long I have been operating that lot because it's been a loser. The lot was originally a warehouse -- we would be operating that lot for seven years.

Q Did you change the operation of that lot in any major way to accommodate more automobiles, for example, since 1963 when you first began to operate it?

A It was changed just recently when the Blue Cross bought the two adjoining buildings and the old V. F. W. property so that it added about 30 cars to the parking operation.

Q You did make a change recently to accommodate 30 more cars?

A Yes, sir.

How did you accomplish that, what kind of a change did you make?

Well, I did not make the change. The owner of the property made that change. He tore down the buildings and filled it with gravel, and it turns out that instead of getting the 33 cars that we thought we would --

I didn't ask you that.

We're only getting about ten.

MR. BOREMAN: You asked him the question; let him finish.

MR. BOEHM: That is what I want him to do just answer my questions, not volunteer information.

MR. BOREMAN: If you asked him the question "Who made it," he certainly could tell who made it.

MR. BOEHM: I object to the witness's volunteering information, Your Honor. He should answer the question I asked him.

THE COURT: The witness may answer the question, but he can also explain it, and that is probably what he was attempting to do.

MR. BOEHM: He was getting into another area as to how many people actually use the

30 spaces, and I didn't ask him about that at all.

THE COURT: We will sustain your objection.

(EXCEPTION NOTED)

MR. BOREMAN: It seems to me he asked him about the spaces and how many would it accommodate. I don't know why he can't explain what the spaces are for. Just because he might not like the answer --

MR. BOEHM: Your Honor, I think the answer is easy; Mr. Boreman has an opportunity to ask the witness more questions.

MR. BOREMAN: If you don't like the answer don't ask the questions.

THE COURT: The Court has ruled. I admonished you before about getting into this collateral argument. I am not going to admonish you again. Proceed.

BY MR. BOEHM:

Q Mr. Shepard, as to the Quick Park Lot which is located on Fourth Avenue, which you lease from Duquesne University, how long have you been operating that one?

A Ten years, I would say.

You began that in about 1960?

A Yes, sir.

Q Have there been any major changes to that structure?

A No, sir.

Q Is that a structure or an open lot?

A It's an open lot. Aside from repairs and maintenance there have been no basic changes.

Q Have you made any alterations there so that you can accommodate more automobiles?

A No. It's completely bound property. There is no way to expand it unless a building was torn down.

Q Do you have Exhibit 1 before you?

A Yes.

Q With respect to your Stanwix Garage lot, I notice that under Numeral Three, Wages and Salaries, you had an increase from 1968 to 1969 of approximately 12 per cent, 56,000 to 62,000, is that right?

A Yes.

Q And, then, you also had an increase from 1969 to 1970 from sixty-two five to sixty-seven five?

A Yes, sir.

Q About eight and a half per cent.

This is as a result, I suppose, of your negotiations -

A Yes.

Q This is as a result of your negotiations with the Teamsters and labor contract that resulted?

A Unfortunately, yes.

Q And from 1968 to 1969 you had an increase in your general insurance expense of eight hundred and some dollars?

A Yes, sir.

Q But you don't anticipate in 1970 that that cost will be increased at all?

A We negotiated at that time a three-year policy. The insurance company has certain opening clauses in the event of more than normal losses.

Q I notice also that your utilities and telephone, for example, increased from $7,317.00 in 1968 to $8,182.00 in 1969 which is a substantial increase of almost $1,000.00.

A Yes.

Q But yet you anticipate there again for 1970 that figure will be exactly the same?

A I didn't anticipate it, but Mr. Buzzard wouldn't increase it. There hasn't been any indication that the electric rates were going to go up so he wouldn't put an increase for utilities.

Q You say you didn't anticipate that, Mr. Buzzard did?

A Mr. Buzzard wrote the thing out as the same figure because we use the same amount of energy. I said it ought to be

higher because we might get an increase in electric rates, but he said you can't take that into consideration.

When was the first time you saw Exhibit 1 exactly in the form it is now?

About a week ago.

A week ago?

Well, when you say Exhibit 1 in exactly the form that it is now -- there are pieces of it that I did not see until today or yesterday in court.

Was there any of it that you didn't see until today?

No. Yesterday would be the first time that I saw much of it, all except my own. What I am trying to say is that I could not -- Mr. Stabile's figures were not -- am I editorializing now? If I am, I'm sorry. Mr. Stabile's figures were not available to me at all. Mr. Stabile's numbers were not shown to me.

I am talking only about the portion of Exhibit 1 which is applicable to you.

I thought you said Exhibit 1. I am familiar with the figures in Exhibit 1.

When did you see the figures that are set forth in Exhibit 1 applicable to your operations in the form they are right now in Exhibit 1?

In exactly this printed form I would say maybe a week ago.

Q One week ago?

A Yes, sir. I don't remember the exact day.

Q When you looked at it did you look at it and consult with Mr. Buzzard?

A The consultation occurred over a month ago when Mr. Buzzard was in our offices. We had break-down figures on these things. These were given to Mr. Buzzard, all of those numbers were analyzed and they are substantially the same today.

Q What I am driving at, I think you understand, is that you said it was Mr. Buzzard's projection of $8,182.00 -- what I want to find out is if Mr. Buzzard had a figure in there which you didn't agree with, didn't you point it out to him, "This may be your projection, but it is not mine"?

A I don't know the point you are making. I am trying to say that many of the expense figures should normally be higher because this is what you come to expect. Now, if that's -- I hear the electric rates are going up, and if that is hearsay, okay. I don't know what you are driving at.

Q If you were preparing this report instead of Mr. Buzzard, it would be different than it is today, you would have higher expense figures, is that right?

A I'd add four to five per cent to the electric figures. I'd add two to three per cent -- we have already increased

the labor rates because that is written into a contract. The figures in this report are really not your projections for 1968 and 1969, they are Mr. Buzzard's?

They are much more conservative than mine would be.

MR. BOREMAN: They are not Mr. Buzzard's figures, they are the exact figures of the books.

THE WITNESS: That's correct, sir.

MR. BOEHM: That is what I am asking the witness.

THE WITNESS: They are much more conservative than --

BY MR. BOEHM:

Q You heard Mr. Buzzard say that he completed Exhibit 1 the night before we began this case.

MR. BOREMAN: I object to that, Your Honor. Mr. Buzzard's testimony was not that he completed it. He got it in that final form -- we took something out of Exhibit 1 in court yesterday.

BY MR. BOEHM:

Q Now, I don't know whether it is correct to say yours or Mr. Buzzard's, but from 1968 to 1969 with respect to the Stanwix Garage you show an increase in revenue and then

you also show a continued increase in revenue for your 1970 projections.

A Yes, sir.

Q Did you take into consideration the possible increase with respect to users of the stadium for 1970?

A The projected income took two things into consideration. I took them into consideration.

Q Now, I am talking about 1970, so first I have to ask you if you played a part in the 1970 projection or if that is entirely Mr. Buzzard's projection?

A That's Mr. Buzzard's projection.

Q You played no part in that figure?

A No.

Q You don't know whether or not he took into consideration increased parking as a result of the opening of the stadium or not?

A Mr. Buzzard arrived at that by taking the six-month figures for 1969 and applying the same percentage to 1970.

Q So, obviously, he didn't take the use of the stadium into consideration?

A We talked about it and we decided --

THE COURT: Counsel, I think Mr. Buzzard answered the very question that you put in his testimony.

MR. BOEHM:

With respect to the First Avenue lot, your answer would be the same with respect to the 1970 projection, is that right?

Yes, sir.

Let me ask you this, Mr. Shepard, in your consultation with Mr. Buzzard did you give him any figures on what your investment is in these different garages?

I don't recall his asking that question at all.

You said with respect to the operation of the Horne's and Gimbels lot, which are Parking Authority lots, that you interchange employees.

That's right.

But they are in fact on the same payroll?

Yes.

Could you explain that?

Each of the garages require a certain number of employees, all of the parking facilities require certain numbers of employees. We keep a time book on each facility. Every time an employee is assigned there, regardless of the number of hours he is assigned there, that time book is a record of the time that man spent on that particular location. If a man is sick or a cashier is sick and Horne's needs a cashier or Gimbels needs a cashier, we are

free to take him from one location to another.

Again, the time book shows exactly the time worked in those particular locations. But since all of the men are essentially -- well, all of the men are members of the Local 926 of the Teamsters' Union, their rates are the same so that it costs no more to have a man of a certain class at Stanwix than it does to have a man of a certain class at Horne's or Gimbels or at the Quick Park Lot.

Q Do you keep separate payrolls for each of the lots?

A We keep separate payroll records. As a matter of fact, these records are audited continuously.

Q So that if your employees were actually used on a Parking Authority lot for a period of time, their expense would still be on your books for your private garage, right?

A No, sir. Any employee that works for Horne's is charged to Horne's and is not charged to Stanwix.

Q Then you do keep different payrolls, right?

A I said we keep different payroll records. We have one payroll. Maybe we're getting into a technical definition here.

Q What is clear is that your private lot pays only for the services rendered by employees that are actually working and for the number of hours worked on your private lot?

A Yes, sir.

And the records that you gave Mr. Buzzard reflect that?

Yes, sir, exactly.

Do you know the number of automobiles parked in each of the facilities that are set forth in Exhibit 1 that you manage under lease, the first six months of 1969?

I can't recite that figure, but I am sure that I can have it for you -- I could have it for you in a very short time. A call to my office would give it to you exactly.

You don't know, then, I expect, the number of automobiles parked at these places for the first six months of 1970, either?

I could not say that, no.

Was that information given to Mr. Buzzard so that he could make his 1970 projection?

It was available to him. I do not know whether he took that information.

Following the financial sheets that are prepared there, Exhibit 1, for your operations, there is a schedule of parking rates presently in effect.

Do you see that page?

Yes, sir. It starts out with the Stanwix Garage, and it says "Rates effective January, 1969."

Does that mean that there has not been a rate change since January of 1969?

A There was one rate change in the night rate that changed the maximum to a dollar and a quarter.

Q I am talking about the Stanwix Garage.

A Stanwix Garage, yes.

Q You say there was a change with respect to the Stanwix Garage?

A Only in the night rate.

Q Is that reflected on Page 1 there that we are looking at?

A It is not reflected on Page 1. The maximum should read $1.25.

Q When was that change made, sir?

A That would be made the first of September. Give me a day or two forward or back on that one, please.

Q Sure.

MR. BOREMAN: The first of September this year?

THE WITNESS: Yes, sir.

BY MR. BOEHM:

Q Were there any changes in your rates at all in February of 1970?

A There were none, no.

Q How about the First Avenue Lot which is on the same page. You say their rates were effective June of 1969. Was there any change in those rates since June of 1969?

No.

Did those rates become effective for the first time in June of 1969?

Yes.

That is when they were established?

Yes.

That is the case with the Stanwix Garage, too, that is when the rate was established?

The rate was established in January of 1969, yes, sir. January 30, to be exact. I have a complete schedule of the rate changes if you are interested and the dates they occur.

Q With respect to the Quick Park Lot, which is the next one, did those rates as set forth become effective for the first time in January of 1969?

A Yes, 1/27/69.

Q Has there been any change since that time?

A No.

Q The next one is the Port Duquesne Sixth Street Garage. Those become effective for the first time February 1, 1970, I take it?

A Yes, Port Duquesne-Sixth Street Garage effective February 1, 1970.

MR. BOREMAN: If the Court please,

counsel has already had his objection sustained leaving out these Parking Authority garages.

MR. BOEHM: I withdraw the question.

BY MR. BOEHM:

Q The Fort Duquesne-Sixth is a Parking Authority garage, is it not?

A Yes, sir.

Q Mr. Shepard, you mentioned that part of your job as a parking lot operator is to attend City Council hearings.

A Yes, sir.

Q When did you attend these City Council hearings in connection with the proposed increase of this parking tax from 15 per cent to 20 per cent?

A It seems like yesterday. It was when they had the public hearing, and I could not tell you the date.

Q Sometime in November of 1969?

A I would assume so, yes.

THE COURT: Were you given an opportunity to speak at that meeting?

THE WITNESS: Yes, sir, I did.

THE COURT: And did you present for and on behalf of the parking business the position that the industry would be placed in

by virtue of the introduction of an ordinance raising the parking tax?

THE WITNESS: Yes, sir, I did so. I don't have the notes that I made at that time.

MR. BOEHM:

Sir, has it been your experience in the past that when you increase the rates you also receive an increase in your revenue?

Yes, sir.

You also said in your testimony that there are no policemen that are stationed to direct traffic in connection with your garages, is that right?

I stated that there were no policemen assigned to my garage to direct traffic.

It is true, isn't it, that with respect to some of the garages you operate there are policemen stationed in the street to make sure that motorists do not make left turns, for example, into your garage?

Let us take the Stanwix Street Garage, the one across from Horne's. Isn't it true there is a policeman there on Stanwix Street to prevent motorists from making a left turn into your garage?

No, sir.

Q It is not true?

A I don't know what the policeman's instructions are. But he is not stationed there for my particular convenience or to prevent people from coming into my garage, I feel certain of that.

Q Is he stationed there at all?

A He is not stationed -- as far as I know, again I can't talk for the Department of Public Safety --

Q I want to know whether you see a policeman there.

A I see a policeman at the corner of Fort Duquesne and Sixth Street, I see him sometimes in front of my garage. I see him at Penn Avenue and Stanwix Street. There is a corner man assigned to that location and there ought to be more.

Q I agree.

And when you see him there, what is he doing, he is directing traffic, isn't he?

A He is directing traffic, yes, sir.

Q You never saw him prohibiting a motorist from making a left turn into your garage?

A I can't recall.

Q Can you recall seeing policemen stationed directly in the vicinity of these other garages?

A From time to time, yes.

Q In your Stanwix Street Garage, when the stadium is being

you do have a pretty full lot, don't you?

Yes, we do. It reduces the amount -- it reduces the amount of shoppers that we have. Actually our receipts are lower on a day such as that.

They use the stadium for a night affair for the most part?

Yes.

And when the people leave your garage after having attended a performance of some kind at the stadium there is quite a bit of traffic congestion because they are all leaving at the same time?

Not because they are leaving my garage. As a matter of fact, there is not a great deal of congestion because the people don't come all at once. There isn't any easy way to either get to the stadium or get from the stadium back to the garage, the boat can only hold so many people and they are spread among certain garages. I would imagine under present circumstances with Liberty Avenue all tied up, with Stanwix Street from Forbes Avenue to the Boulevard, with Fourth Avenue closed there could be congestion if more than five or six cars occurred at the corner at the same time.

Are you trying to tell me if I attend a Pirate baseball game and then go back to your garage to get my car, regardless of whether I take one of the shuttle busses or walk over the "Bridge to Nowhere" that when I get to your garage if I go

directly to it I will be able to get in my car and directly enter Stanwix, or whatever the street is adjoining the garage, and drive off?

A The worst problem you will have is getting past my cashier. This is where the major slowdown occurs.

Q In your garage. But after I get past your cashier I will be able to enter the throughway without any trouble?

A If there isn't a bus in front of me you shouldn't have too much trouble.

Q You made remarks about the population of the City of Pittsburgh. You don't mean to say, do you, that the downtown population of the City of Pittsburgh, the daytime population of the City of Pittsburgh, has decreased, do you?

A It would purely be a matter of opinion. I would say that it has been fairly stable. I would say that perhaps it has moved out. I would say in my opinion it has decreased or remained stable.

Q Are you taking into consideration the large office buildings that have been built recently and are still under construction?

A How far back do you want to go? If you are talking of from 1945 or '46 or the '50's when Gateway Center was built --

Q Let us go from 1967 to the present time. You don't think that the downtown daytime population of the City has decreased

do you?

Yes, sir, I do.

To what do you attribute that?

The large office building complexes that are being built in Greentree, the large office building complexes that are being built in Monroeville, the runaway -- actually, the run-away people who avoid the City taxes. I consider this has a great effect on the City. The J. & L. moved many of their people over to the South Side, while it's still within the City limits it's out of the core where these garages -- I could be wrong. It is my opinion that the downtown population has declined in the last three years and probably will continue to do so.

The construction of office buildings, of course, in your opinion results in increased population, but you say Greentree and Monroeville would have gone up.

Did you take into consideration the new office buildings built downtown?

I don't know how many square feet that the U. S. Steel Building has rented, but I think it's quite a little other than what they are occupying now, other than what the corporation intends to occupy itself.

You didn't investigate, you really didn't make a study of this problem, did you?

A I did not.

Q This is just your off-the-cuff opinion that you have given in direct examination and also under cross-examination?

A Yes, sir, and I said that.

MR. BOEHM: That is all I have, Mr. Shepard. Thank you.

THE COURT: Any further questions from this witness?

MR. BOREMAN: Yes, Your Honor.

- - -

REDIRECT EXAMINATION

BY MR. BOREMAN:

Q Mr. Shepard, that Stanwix Garage, that is on what street, Seventh Avenue?

A No, Fort Duquesne Boulevard and Stanwix Street.

Q Stanwix Street leads into Fort Duquesne Boulevard and then into the --

A Parkway system, yes, sir.

Q -- the bridge.

If cars are coming from the stadium -- are going to the stadium going to other parking lots that are yours or parking garages, they are going down Stanwix Street, they don't park at your place, busses don't park at your place, in other words, traffic is moving along Stanwix Street

before the game and after the game, does your parking garage have any connection with that traffic?

We exit cars onto Stanwix Street. But, again, as I said, the cars are metered onto the street, they don't come out in a rush because each car has to pay the cashier at the exit and this lets one or two cars at a time onto the street.

If there is a big traffic light up from the Fort Pitt Boulevard all the way down to the Fort Duquesne Boulevard with cars and busses, -- and I am speaking about the cars on the street that never have been in your garage and never intended to go in your garage.

Under those circumstances we're out of business because a car can't get in or out if I have 600 cars in the garage that are still in there, there is no way to get out.

Are they contributing to that traffic jam?

They can't contribute to a jam if they can't get into it.

If that congestion is going past Stanwix Street, does that have any connection with your parking business?

That's no part of my business.

When you were referring to the decline in Pittsburgh, you were referring to the recent information on the census?

We were talking about the core. The City attorney's question referred to the core. The other question referred to a matter of record as to the census figures.

Q Your statement about the core is just your opinion not backed up by any investigation?

A That's correct.

Q When you said that if you increased the rates that would increase the revenue -- did you say that?

A I said it has, yes.

Q What does that do about your net profit, does that increase it?

A It has not increased my net profit.

Q Why is that?

A Because the parking tax was increased substantially higher than I could increase my rates.

Q In the First Avenue Lot, let us refer to that, you lease that from Blue Cross?

A Yes, sir.

Q You said they tore down some buildings to expand the parking

A Yes, sir.

Q Did you require them to tear down the buildings?

A No, sir.

Q Why did they do it?

A They purchased the property, they tore the buildings down to avoid paying taxes in 1970, building taxes.

Q Who are generally the parkers in that lot, are they the Blue Cross people in the building there?

Some Blue Cross, mostly all-day people in the general area. So that the tearing down of the buildings and providing more parking space was not in any way connected with your choice or working in that direction?

I had nothing to do with the decision to tear down those buildings and turn it into a parking lot, no, sir.

From your observation would you say there are more or less policemen stationed around Horne's than in those areas around your garages?

I don't know what you mean, I'm sorry.

You were asked questions about a policeman stationed around your garage. Where are those policemen stationed?

They are stationed, at least to my knowledge, at the corner of Fort Duquesne Boulevard and Stanwix Street.

What are they doing there?

They are directing traffic.

They are directing traffic?

Yes. This is the major interconnection for downtown, as I see it, in the parkway system. So much of the parkway traffic flows past that corner. In other words, if you want to get to the North Side, this is a logical way to do it. If you want to get to the South Hills, Stanwix Street or Fort Duquesne Boulevard, which work with each other, are a logical way to do it. The Tenth Street Bypass, while it does

not actually occur -- the connection does not actually occur at Stanwix Street, congestion on the Fort Pitt Bridge does not allow traffic to turn off Stanwix Street. In entering the Triangle, the opposite occurs. Stanwix Street and Fort Duquesne Boulevard is a major distribution point for traffic in the downtown area, and for this reason they need a policeman.

Q You are saying that the policeman is stationed for that purpose and has nothing to do with your garage?

MR. BOREMAN: He is leading the witness. He is incompetent to answer the question.

THE COURT: Objection sustained.

(EXCEPTION NOTED)

THE COURT: Let us get onto something else here. You have been beating a dead horse here, I think, with regard to these traffic problems. We know that the officers are stationed at these various intersections not only down there but all around town.

BY MR. BOREMAN:

Q One more thing, Mr. Shepard.

When you appeared before City Council, was Plaintiffs' Exhibit 1 prepared?

A No.

Did you show City Council any of the figures that you have in Plaintiffs' Exhibit 1?

No, sir, I did not.

Had you had them compiled at that time?

Oh, we have our own records, yes, sir, not in this form.

Did you give City Council any figures as to your business?

No, sir.

In any way?

I referred to the fact that my profits were down considerably, yes, sir.

Without specific figures?

Without specific figures.

MR. BOREMAN: I have no further questions.

THE COURT: Have you finished your cross-examination on this witness, Counselor?

MR. BOLLIM: I have one more question, Your Honor.

- - -

RECROSS-EXAMINATION

MR. BOLLIM:

You made the statement, Mr. Shepard, that when you have increased the rates this really hasn't helped you too much after a raise in the parking tax because the increase in the

parking tax has actually been more than the increase in your revenue.

Yes, sir.

Now, take a look at your sheet with respect to the Stanwix Garage.

What I had reference to, sir, originally, was the one that we have been referring to, although it is not actually part of the evidence, it is one that you manage, that was the Parking Authority lot --

THE COURT: That is out of the picture here. Have you finished?

MR. BOEHM: I would like to have just a second, Your Honor, to take a look at this.

Your Honor, I would like to ask the witness, I think since he has testified about the operations of the Parking Authority lots, why it is that the Parking Authority lot revenues increase substantially more than the amount of the parking tax whereas his lots do not.

MR. BOREMAN: Objection, Your Honor.

MR. BOEHM: He has talked about managing these Parking Authority lots, he has told us they do not pay any real estate taxes and he

has talked about the operation of that lot so that I think he is competent to answer this kind of a question.

THE COURT: We don't think it is relevant at the present time. Accordingly, we will sustain your objection, Mr. Boreman.

(EXCEPTION NOTED)

MR. BOREMAN: I have no further questions.

MR. BOEHM: I have no further questions.

THE COURT: You may step down, Mr. Shepard

MR. BOREMAN: Your Honor, I wonder if we might have a five-minute recess.

(Recess taken.)

- - -

JOHN T. STABILE, called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. BOREMAN:

State your name and address.

John T. Stabile, 933 Osage Road, Pittsburgh, Pa., Zip Code 15243.

What business are you in, Mr. Stabile?

I'm in the parking business.

Q In the City of Pittsburgh?

A Exclusively in the City of Pittsburgh, Allegheny County.

Q How long have you been in the parking business?

A Since 1925, over 45 years.

Q How many parking facilities in the City of Pittsburgh do you operate?

A Approximately 42.

Q How many including Allegheny County?

A One position at the Airport.

Q What portion would you say you operate in the parking industry in the State of Pennsylvania?

A I'm the largest parking operator in Pittsburgh and Pennsylvania.

Q Do you operate as an individual, partnership or corporation?

A Partnership and corporation.

Q Who is your partner?

A Mr. Del Sardo.

Q Is he in the courtroom today?

A Yes.

Q Do you operate as a lessee of any Parking Authority garages?

A We operate four garages under the Parking Authority.

Q Which of your companies operates the Parking Authority garages?

A One company, Parking Service, operates the Ninth and Penn

Garage, Third Avenue Garage and the Boulevard Garage at Sixth and Bigelow. Alco Parking operates the Allegheny Center.

The Gateway Center Garage is not a Parking Authority?

No.

So you operate as a lessee of four Parking Authority garages?

Right.

Under the terms of your lease who is required to pay the parking tax?

We are required to pay the parking tax as part of an operating expense.

How about the business privilege tax?

We pay that also.

And generally under the Parking Authority leases, do you pay a flat rental or percentage rental or combination of both?

We pay a combination of guaranteed rental plus a percentage.

Are you required to put up security for rent?

We have a $300,000.00 security to meet our obligation.

Mr. Stabile, in Plaintiffs' Exhibit 1 would you turn to the Table of Contents and tell us which of these operations are your operations?

Alco Parking Corporation; William Penn Parking; Parking Service Corporation; Arena Parking, Inc.; Fourth Avenue Parking, Inc.; William Penn Parking Garage, Inc.; Campus

Parking, Inc. That's all.

Q And who operates Grant Parking, Inc.?

A That's operated by my son on a management basis.

Q What is his name?

A John T. Stabile, Jr.

Q The figures that are in Plaintiffs' Exhibit 1 with reference to your operations, will you tell us how they were prepared?

A These were prepared by our accountant plus our certified public accountant, J. K. Lazzer Company.

Q What was the work done with Mr. Buzzard?

A Mr. Buzzard looked over our records, we produced the records and he copied figures from our records.

Q Now, did you discuss the preparation of your part of Plaintiffs' Exhibit 1 with Mr. Buzzard at any time?

A Oh, yes.

Q Do you remember how long ago it was when you first began the preparation of this?

A I think it was either the latter part of May or early part of June because our case was coming up August 15 and it was postponed till now.

Q And in these allocations that Mr. Buzzard testified he made, did you in any way assist him in them or discuss them with him?

A Yes.

You heard him testify that he made certain allocations with respect to insurance and pensions. Are you familiar with the allocations he made?

He didn't make it exactly, but it comes out the same -- our pension is $6.00 per man per week and hospitalization is $33.28 per man per month.

How was the allocation made?

Well, if a garage has an average of four people we will charge $6.00 per week per man and we charge $33.28 per person per month.

Would you say the allocations which Mr. Buzzard finally placed in this exhibit are a fair reflection of the books and records of these various companies?

The way he computed it, it come out the same as the way I did it.

Are you familiar with the figures that went into this exhibit as far as your companies are concerned?

Yes.

And you testified they were taken from your books and records?

Right.

Are they true and correct?

As far as I know, I'll say yes.

Mr. Stabile, you have been in the business since 1925?

Yes.

Q You operate approximately 42 lots in Pittsburgh?

A Yes.

Q And I think you said you were the largest operator in Pittsburgh and Pennsylvania, as a matter of fact?

A Yes.

Q Will you tell us what is the normal rate of return in operating a parking facility?

A We expect from ten to twelve per cent minimum.

Q Can you tell us upon what basis you arrive at that?

A Well, which way do you mean?

Q Why don't you say five per cent or twenty per cent?

A Because some money is on a long-term lease -- we must have twelve or more to be on the right side of the ledger in future years. We may start out at fifteen or twenty, and by the time the lease expires we might wind up around ten.

Q And you heard yesterday the reference to Allegheny Center?

A Right.

Q Is that a profit making operation?

A That is not a profit making operation. It's one of my miscalculations.

Q I think you put up a security deposit to guarantee your lease, didn't you?

A We put a security deposit of $525,000.00 at market value. If the value has dropped we add, and in the last 90 days

added $200,000.00 to keep it up to $525,000.00.

How long is your lease at Allegheny Center?

It expires in 2013.

Why did we take the Allegheny Center lease out of this Exhibit 1?

It seemed out of balance, and I don't think it would be fair to show in this book because it would unbalance the thing. The loss is $207,000.00. I hope it will come down as years go by.

Now, our profit -- our loss would have been less had not it been for the parking tax.

Why do you say that?

Because we had to pay 20 per cent of gross.

Irrespective of whether you made a profit?

Profit or not.

Now, Mr. Stabile, you also operate a lot at the Roosevelt Hotel. Which of these companies operated that?

William Penn Parking Lot.

Are you still operating that lot?

Now, wait a minute, that was two lots which we operated as one.

As lessee?

No, as owner. We own the property.

Who owned the property, which company?

A William Penn Parking Lot. We sold a portion of it to the Roosevelt Hotel.

Q When?

A In November of 1969. They took possession January 1 and operated the lot for themselves so they could take care of their hotel customers. Then we made new entrances at the annex lot and we have no comparison.

Q Why was it left out?

A Because it showed too much of a loss. It was a beginning operation. We had new entrances and new exits. The lot originally was opened in 1936 and people were in the habit of going below, and when we split the lot they haven't learned to come into the new location.

Q And so you left it out because you felt the comparison could not be made?

A Right.

Q Did that lot ever show a profit?

A It did.

Q In what years?

A Oh, 1950 to 1962.

Q How about after the parking tax?

A Since that it's gone down. It's a combination of parking tax and increase in property tax is diminishing our rate of profit.

When you sold the portion of the lot to the Roosevelt Hotel, was the parking operation showing a loss?

Just breaking even.

Breaking even?

(Witness nods head.)

That would be in 1969?

Right.

I believe you also have an arrangement for operating the parking facility at the Carlton House Hotel in Pittsburgh?

Yes.

Will you tell us about that?

That's on a management-fee basis. We operate the garage for the Carlton House. We furnish the help, we supervise the help, we do not count the money.

You do not collect the money?

We do not collect the money. The hotel itself collects the money and we don't know what they get, or anything; but every six months or yearly they send a statement of what they took in and what they made or lost.

So what you do is simply have a management arrangement to supervise the employees?

Yes.

How much do you get for that?

$6,000.00 a year.

Q And that is why you left it out of this?

A Right.

Q It is not one of your operations except on a management basis?

A Right.

Q Now, Mr. Stabile, in working with Mr. Buzzard, what instructions did you give your accountants and controllers?

A To give Mr. Buzzard anything that was needed, show him anything he wants and give it to him.

Q Did you hold anything back?

A I did not.

Q Did you give your accountants or Mr. Buzzard any instructions that you wanted him to show less profit or a loss?

A No, sir.

Q So to the best of your knowledge those records are accurate and correct --

A Accurate.

Q -- of your business operations?

A And I have a statement from J. K. Lazzer as to their accuracy

Q Mr. Stabile, you are the one, I believe, who has been involved in negotiations with the new Three Rivers Stadium Parking?

A That's right.

Q Have you signed a lease for that facility?

A We signed a lease -- let's go a little bit further. I was

a letter of intent in April of 1962.

1962?

Guaranteeing them $500,000.00.

Was the parking tax in effect at all then?

It was not in effect then.

You guaranteed $500,000.00 a year for how many years?

For 40 years which made it $20,000,000.00 I guaranteed.

Which of your companies?

Alco Parking. In order to prove our ability for it we had to put up $500,000.00 to guarantee our rent. Since then --

You may ask "Why so high," and everything else. We presented the place for $650,000.00, $500,000.00 rent, that leaves us $150,000.00 gross profit to pay everything. Since then we had a 20 per cent parking tax. Now, that will come to $500,000.00 for rental, 20 per cent of $650,000.00 is $130,000.00 parking tax, that leaves $20,000.00 to pay help and everything.

I presented this argument in Council. I had a lengthy discussion in Council. I said, "Do not pass this tax. This can hurt the financing of the stadium."

And their answer was it wouldn't. They didn't want our streets being worn out. I'd rather have worn out streets than have grass growing on it.

Are you going to carry out the terms of that?

A I don't think I will. I cannot meet it. I'm not going to take an obligation on that I'll lose $50,000.00 a year out of pocket.

Q Have you had discussions about modifying or canceling this lease?

A Yes, I have.

Q On what basis do you expect to cancel?

MR. BOEHM: I object to this line of testimony, Your Honor. This is irrelevant, incompetent and immaterial.

MR. BOREMAN: It is all right with me. I wanted to show Your Honor whether it is capable of being canceled or not.

THE COURT: The point is that because of the tax he can't operate the lease.

BY MR. BOREMAN:

Q You also have a negotiation to operate a parking facility at Shadyside Hospital?

A Yes.

Q What happened there?

By the way, when did you have those negotiations?

A The last of December of 1969.

Q What happened there?

A In that agreement we was supposed to build and lease back to

hospital and then manage for the hospital. In the projection -- in that projection we took in $240,000.00 and our expenses including parking tax come to two hundred eighty-eight, I'm giving you round figures, and the loss was $48,000.00.

That was with the 15 per cent parking tax?

Fifteen per cent parking tax. The parking tax was $36,000.00 at 15 per cent plus the privilege tax was $1440.00. The hospital could not absorb this loss and neither could I, so thereby they went into a different arrangement.

And you are not going to go into that venture?

No.

And if the parking tax is 20 per cent the loss becomes greater?

It would be a whole lot greater.

So you have abandoned that venture and the hospital --

Abandoned it.

THE COURT: What is the privilege tax, how much is that?

THE WITNESS: Six mills of the gross.

THE COURT: Is that what we call an occupation tax?

THE WITNESS: No, that's a business

privilege tax. That's a tax for the privile
of us doing business in Pittsburgh.

THE COURT: That is six mills?

THE WITNESS: Six mills.

THE COURT: What is that based on, you
gross profit?

THE WITNESS: Gross profits.

MR. BOREMAN: Gross receipts, the same
identical basis.

MR. BOEHM: Your Honor, the ordinance
has been offered in evidence. I think the
ordinance will speak for itself rather than
have the legal testimony come from laymen.

THE COURT: Was that ordinance with
respect to that particular tax offered in
evidence or was it the one on the parking ta

MR. BOREMAN: They both were, Your Hon
It is Exhibit 9, I think. Yes, Exhibit 9.

BY MR. BOREMAN:

Q Mr. Stabile, in looking over Exhibit 1, you note that there
are a number of your operations that show losses?

A Right.

Q With that situation, why do you stay in the parking busines

A I've been in the parking business for 25 years and some of

those were made prior to the parking tax. We made a profit, but since the parking tax we have gone down.

Now, some of these leases will come into renegotiation. They have come into new landlords that want a profit and they have intimated to me that they are not going to -- so what I would do at those locations, I will give them back to them.

And how about the leases that make a profit?

They are subject to negotiation, too, after the lease expires

Suppose they show a profit of less than ten per cent, what do you expect to do?

MR. BOEHM: Your Honor, I object to the questions as to what this man may or may not do in the future.

THE COURT: We will sustain your objection.

(EXCEPTION NOTED)

MR. BOREMAN:

I have one more question.

Mr. Stabile, do the police render you any special services in operating your parking lots?

No, they do not. Three years ago I'd asked to have a policeman. They said, "If you want one, you will have to pay for it."

Specially?

A Yes.

Q As a parking operator, do your garages cause traffic congestion?

A They do not. They prevent traffic. They take cars off the street.

Q Are there any tieups on the streets when your cars exit or enter the parking garages?

A No, there are not.

MR. BOREMAN: I have no further questions.

- - -

CROSS-EXAMINATION

BY MR. BOEHM:

Q People drive their automobiles downtown because they know there are parking garages like yours where they can put their cars.

A They don't park downtown to park, they come downtown to spend money.

Q I say they drive their cars downtown.

A Yes.

Q That is not the only way of getting downtown.

A No.

Q You can get downtown on a bus, depending on where you live, right?

That's right.

You said in answer to one of Mr. Boreman's questions that you expected a fair return of ten per cent on your parking business.

Yes, minimum.

What you mean by that is a fair return of your initial investment or your investment in your business, is that right?

That's right.

And when you are, like Mr. Shepard, managing for a fee a certain parking lot you have, I guess, virtually no investment in that kind of a business, right?

That's right, no investment except time.

When you do that, what is your percentage that you receive?

What's that?

Your management fee.

It all depends on how much work is required of me.

What is the ordinary fee charged?

Anywhere from seventy-five to ten thousand plus a percentage of the profit.

It is usually a lump sum plus a percentage of the profit?

Yes.

Of the net profit or the gross revenue?

Net profit.

Do you manage any garages for the Parking Authority?

MR. BOREMAN: That is objected to, Your Honor. He has already testified he is a lessee at four Parking Authority garages. That is different from managing.

MR. BOEHM: That is what I am asking.

THE COURT: The witness has already answered your question.

(EXCEPTION NOTED)

BY MR. BOEHM:

Q But you are, as Mr. Boreman suggests, a lessee, you lease from the Parking Authority four garages?

A Yes.

Q And you work those on a management fee?

A What's that?

Q You work those on a management-fee basis?

A No, that's a guaranteed rental. We pay the parking lot a guaranteed rental which really amounts to the amortization of the bond in 30 years plus a percentage of the profit.

Q Are the garages that you lease from the Parking Authority part of Exhibit 1 which was prepared by Mr. Buzzard?

A Yes.

Q Which garages are they?

A They are the Boulevard Garages at Sixth and Bigelow, Third Avenue Garage, Ninth and Penn. We've deleted Allegheny

from this Exhibit 1.

r. Stabile, about 80 per cent, I suppose, of the lots that are included in that Exhibit 1 are yours, right?

ight.

hat would be your estimate of the percentage of parking operations downtown owned by you or one of your corporations?

55 to 60 per cent.

ave all of your operations paid their parking taxes currently?

e have. At least three months of the year we give them the hole use of the office and we couldn't get away from that.

ad you are paid to date?

ight.

o you have Exhibit 1 in front of you, Mr. Stabile?

es.

ould you please turn to the parking rate section following he Alco Parking Corporation statement.

Do you have it?

es.

he first one is the Allegheny Center Garage.

MR. BOREMAN: We have eliminated that.

That was left in there by mistake.

. BOEHM:

orget about that one.

The Sixth and Penn Garage is the next one?

A. Yes.

Q Your rates are effective as of February 1, 1969?

A Right.

Q Have you made any change in the rates since that time?

A No changes.

Q Is that the date that you established the rates there on that page?

A Yes.

Q Do those rates represent an increase over what the rates formerly were?

A There is an increase of five per cent, and in some instances we did not raise it five per cent.

Q Is the same thing true with respect to the Greyhound Garage which is on the next sheet?

A Right.

Q An approximate raise of five per cent there also which became effective February 1, 1969?

A Right.

Q Has there been any change in the rates since that time?

A No.

Q The I.B.M. Garage which is the next one, you changed the rates on December 31, 1969, is that right?

A The only change there has been through the insurance company. They requested our monthly rates to be raised, and that's

what we did. The daily rate has not changed.

On December 31, 1969, however, at the I.B.M. Garage, the rates were changed, right, effective as of that time?

Yes.

Has there been any increase since that time?

In the daily rates, no.

Has there been an increase of another kind other than the daily rates?

There has been a monthly rate increase. That was requested by the landlord, and we recommended not to but they said, "We control the rates and that's it."

The monthly rate was increased from what to what?

Forty-four to forty-nine.

MR. BOREMAN: I would like to record an objection on the record. As counsel knows, the monthly rate is not subject to this tax. It is residential parking so it is immaterial.

MR. BOEHM: The witness says it is not.

THE WITNESS: The I.B.M. Building is subjected to parking tax. There is nothing residential.

MR. BOREMAN: I withdraw the objection.

MR. BOEHM:

Mr. Stabile, would you now keep that place where we are at

the I.B.M. Garage rate sheet and look back to the sheet for the I.B.M. Building Garage, the financial statement. You show an increase of revenue from 1968 to 1967, a projection of -- 1968 to 1970. I am comparing figures for 1968 and 197 You say there is an increase from 1968 to 1970 of $11,000.00 in the revenues and an increase in the parking taxes from 1968 to 1970 of $11,000.00, right?

A Yes.

Q That the revenues and the parking taxes were approximately the same in spite of the fact that the rate was increased effective December 31, 1969?

A In '70 there's one month at 15 per cent and eleven months at 20 per cent. These are projected figures. This is not actually what we paid to the City for 19 --

Q I understand that, sir.

On the next rate sheet has there been no change in the rate since 1968 at the Gateway Towers Garage?

A Where?

Q Gateway Towers, that is the next one.

A No increase in 1970.

Q There has been an increase?

A No increase.

Q Was there an increase in '69?

A Yes.

Does that show on the sheet which is part of this exhibit?

Yes.

What was the change in 1969?

We increased the rate of residential parking and the public parking, and this was done also at the request of the landlord.

What was the change?

MR. BOREMAN: Here I object, Your Honor, as to anything concerning residential parking. Gateway Towers is a residential area.

THE WITNESS: Right.

THE COURT: We will sustain your objection to anything with respect to residential parking.

(EXCEPTION NOTED)

THE COURT: As I understand it they have other parking there. What is the rate change with respect to the other parking as distinguished from residential?

THE WITNESS: We have made no changes since '68.

MR. BOREMAN: Clarify it. You said the opposite before.

Your Honor, I just think he wasn't clear

and I pointed out that we were referring to Gateway Towers.

MR. BOEHM: Let Mr. Stabile tell us whether he was clear or not.

THE WITNESS: I cannot recall everything at one time. My mind has to be refreshed.

BY MR. BOEHM:

Q Are you saying now that on the Gateway Towers Garage there was no increase in the commercial parking?

A Right, since '68.

Q Since 1968?

A Right.

Q On what date in 1968 did the latest increase become effective?

A I don't know the exact date, but -- I don't know the exact date.

Q How about the Manor Garage. Mr. Stabile, do you remember the increases at your various garages without double checking Mr. Buzzard's figures?

Do you understand my question?

A I can't remember 42 locations. If I get to my files then I recall.

Q Do you have your files with you?

A These are exactly like my files (indicating) are.

Do you have your files with you?

No.

Do you remember when the last increase was at the Manor Garage?

February 16 -- February of '69, February 1, 1969.

Do you remember how much the increase was; was it five per cent, approximately?

About that to take over the -- in that garage, too, we do not control prices. We have to have permission from the landlord.

How about the P & L E Lot?

(No response)

Have you had an opportunity, Mr. Stabile, to review the figures that were prepared by Mr. Buzzard and set forth in Exhibit 1?

I've helped to compile this. I gave him a sheet. After he compiled it from my figures then I looked this over.

Have you had an opportunity prior to today to review the figures which he prepared for you?

Yes, I did.

When did you do that?

Last week, about a week.

About a week ago?

(Witness nods head.)

Q Was the booklet in the form it is right now when you reviewed those figures?

A Yes.

Q Then, you are familiar with the figures in this book?

A Yes.

Q Would you say that in all instances where he has set forth the rates as being effective as of a certain day that means that that is the first time that that rate went into effect?

A The new rate, yes.

Q And in all cases it represents an increase over what the prior rent was?

A Increase.

Q Is it in most cases approximately five per cent?

A Five per cent.

Q That is what you have been raising the rates when you have raised the rates?

A Look here, when you say percentage, it all depends. If you have a 35 cent rate and it changes to 50 -- don't hold me to that percentage.

Q The day rate, for example, would be a rate that would be raised approximately five per cent?

A Take care of the five per cent.

Q Open Exhibit 1, Mr. Stabile, to the financial statement for the Gateway Towers Garage.

Now, take a look at the revenues for 1968 as compared to 1970 and the parking tax in 1968 as compared to 1970. Would you say Mr. Buzzard has inserted the correct figures there?

MR. BOREMAN: Which one was that again?

MR. BOEHM: Gateway Towers.

THE WITNESS: I have it.

MR. BOEHM:

Do you see them?

Yes.

The revenue has increased more than the parking taxes, right?

That's right, because of being residential parking.

You mean residential parking is included on this statement?

On this one, yes. It tells you a notation, "Includes revenue from tenant parking on which no parking tax is paid."

Now about the operating expenses with respect to the Gateway Towers Garage, did you help Mr. Buzzard prepare those figures?

He has our payroll figures. He has access to our payroll.

Do you know whether he wrote out the operating expenses relevant to the residential parking on which no tax is paid?

No.

He has all the operating expenses in there from that garage?

Right.

Look at the financial statement for the P & L E Lot, a few

sheets back there.

A I have it.

MR. BOREMAN: No, he doesn't have it. He means the individual one.

BY MR. BOEHM:

Q Now, compare the revenues for 1968 with 1970 and the parking taxes for 1968 with 1970.

A Yes.

Q Would you agree with Mr. Buzzard's figures there?

A I think they are a little bit optimistic on this lot.

Q You think he is being too optimistic, did you say?

A Yes, on the projection of the last six months.

Q Then, you disagree with his figures, is that right?

A Yes.

MR. BOREMAN: Just a minute. That is objected to, Your Honor. I want to make sure the witness understands the question. He said he disagreed with the projection, not the figures.

THE WITNESS: Yes, the projection.

BY MR. BOEHM:

Q Mr. Stabile, looking at the same financial statement, compare the figures for 1968 and 1969 on revenues with the taxes for 1968 and 1969. Do you agree with those figures?

You mean the parking tax?

Comparing the parking tax increase from 6,000 to 11,000, 1968 to 1969.

1968-1969, I do. In 1970 they are projected.

I am just asking you about 1968 and 1969 now. We have already talked about 1970.

Yes.

You do?

Yes.

Your parking taxes increased less than your revenues?

I don't understand.

In other words, you were able to set off the parking tax by an increase in the revenue?

Wait a minute.

I will withdraw it. I think it speaks for itself unless you want to explain it.

MR. BOREMAN: I object, Your Honor. The record speaks for itself.

THE COURT: All right.

MR. BOEHM:

Mr. Stabile, on the White Tower Lot, how many U. S. Government vehicles park there?

Oh, —

MR. BOEHM: Does the Court have the

sheet, the footnote there?

THE COURT: There are some of the details missing in this exhibit, that is the breakdown of the various garages. I have the summary here on the rates, however.

MR. BOREMAN: Excuse me, Your Honor. Your Honor has a copy that doesn't have the breakdown of the Alco Parking.

THE COURT: It has the Alco but it doesn't have some of these others.

MR. BOREMAN: I am sorry, Your Honor. He certainly should have given you a complete--

THE COURT: I am talking about the individual breakdown of all of the expenses and the parking facilities you have listed there. Some of them you have talked about here are not even listed.

MR. BOREMAN: Here (indicating) is Gateway, Your Honor; here (indicating) is I.B.M.; here (indicating) is the P & L E; and here (indicating) is the one that he is talking about right now. They are right after the summary sheet.

THE COURT: Oh, I see.

THE WITNESS: In this location we rent the Government so many square feet for the use of their own parking. We prepare a lease. We don't handle their cars, they drive the car in and put it there.

R. BOEHM:

How many cars, sir?

I don't know how many cars. I'll have to see what the lease calls for, how many square feet of land they rent from us. There are a total of 60 spaces, is that right? That is what Mr. Buzzard says.

That's the size of the lot, 60 cars.

Does that mean it will accommodate 60 cars?

Right.

Do you know how many cars are allotted to the U. S. Government?

I don't know. We rent them X number of square feet.

You don't have any idea whether it is 55 or 58?

Oh, no, it's very little, about eight or nine.

And on those eight or nine spaces you don't pay any parking tax?

Right.

Do you agree with Mr. Buzzard's figures for the 1968 revenues, 1970 revenues and his 1968 parking taxes and his 1970 --

In this projection it's a little high, in 1970. These are

Pennsylvania Railroad lots.

Q They are what?

A These are lots owned by the Pennsylvania Railroad leased to us. I was called in their office, they want to know why we raised the parking rates and their revenue is down.

Q This is the White Tower Lot?

A That's owned by the Pennsylvania Railroad, that whole vicinity.

Q Sir, remember the question I asked you.

Look at Mr. Buzzard's figures where in 1968 he shows your revenues to be $35,252.00; 1970, $50,162.00, and then look at the figures for the parking taxes, 1968 as compared with 1970.

A In that location the projection is a little high.

Q You disagree with Mr. Buzzard's projection there?

A That's on account of the area.

Q Now, compare the figures for 1968 and 1969 that Mr. Buzzard has prepared and those are actual figures, as I understand, from your books?

A Right.

Q Do you agree with those?

A I do.

Q There you can see the parking tax from 1968 to 1969 increased $2,000.00 and the revenue increased $8,000.00.

Eight or nine thousand I suppose would be better. More than 9,000.

9,400.

You have reviewed the exhibit prepared by Mr. Buzzard, so I don't have to continue going through these separate lots for you.

You agree certainly with the figures that he has inserted for revenue in 1968 and 1969, right?

I agreed with the figures before he compiled it in this book.

Before he compiled them in that book you agreed to them?

Yes, because he had one big sheet and I reviewed them.

After he compiled them in the book didn't you look at them?

Yes.

And did you tell him that you disagreed with them in some respect after you looked at them?

No, only on the projection, certain locations, due to the location of a lot.

You disagree on his projections?

On certain locations.

Do you agree 100 per cent with him on the figures that he has used for 1968 and 1969?

I do.

None of your investment is reflected in Mr. Buzzard's

Exhibit 1, is it, Mr. Stabile? Your investments are not reflected there at all?

A No.

THE COURT: Have you any further cross-examination of this witness?

MR. BOEHM: I doubt it, Judge, but I would just like maybe another ten seconds.

BY MR. BOEHM:

Q Mr. Stabile, do you have the figures on the number of cars that you parked during the first six months of 1969 as compared with the number of cars that you parked for the first six months of 1970?

A They are available but they are not on this report.

Q In other words, you made them available to Mr. Buzzard, right

A If he wanted them, if he'd ask for them.

Q Did you make them available to him?

A No, I did not.

Q You didn't give them to him?

A No. You are talking about the number of cars. That's not in this report, but I did give something to Don McNeil, his employer.

MR. BOEHM: I have no further questions.

MR. BOREMAN: May I just take about two minutes so we can get through with Mr. Stabile

before lunch?

THE COURT: All right.

- - -

REDIRECT EXAMINATION

MR. BOREMAN:

Did Mr. Buzzard or Mr. McNeil ever ask you to give them the number of cars?

I gave them to Don McNeil. I said, "If you have to use them, use them, but don't do it unless you have to."

You didn't want to make them public unless you really had to?

Have to.

When you said you disagreed with the projection of Mr. Buzzard, do you mean you disagreed with his entire 1970 projection or only with the gross revenue?

At certain locations. He's low on some and high on some.

You mean in his gross revenue?

Yes.

MR. BOEHM: I object to you leading the witness.

MR. BOREMAN:

Do you agree with the other items in the projection?

Yes.

Will you tell us which ones you disagree with?

MR. BOREMAN: Your Honor, I am not sure

he understands the question.

THE COURT: He understands the question. He has given you the answer a half dozen times that he disagreed with some of the projections in 1970 and some of the locations because of the locations.

MR. BOREMAN: Does he disagree with the revenue or the other items in the projection is what I want to know. If he can answer "Yes" or "No" we won't go any further.

THE COURT: I think he has testified that he agreed with everything else.

THE WITNESS: Yes.

THE COURT: With the exception of this projection for 1970 in some of the areas because of the location.

MR. BOREMAN: I will withdraw the question. One more question I have and that is all.

BY MR. BOREMAN:

Q You have testified you paid the parking tax for 1970. Did you pay it under protest or not?

A I paid it under protest, that is the first and second quarte

MR. BOREMAN: That is all.

THE COURT: You may step down.

Gentlemen, we are going to recess now until 1:30 promptly.

(Luncheon recess taken.)

- - -

SEPTEMBER 16, 1970
Wednesday Afternoon Session

- - -

MR. MARKS: The Plaintiffs call Peter Smith, Your Honor.

- - -

PETER B. SMITH, called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MARKS:

Q Mr. Smith, will you state your address and occupation, please?

A My address is 78 Dudley Road, Sudbury, Massachusetts. I'm Northeast Regional Manager for Meyers Parking System.

Q How long have you been associated with that firm?

A Since 1965.

Q What are your present responsibilities?

A I cover all the operations throughout New England and Northern New York State.

Q How many facilities does that include?

A Approximately 40.

Q What were your prior positions with the company?

A I came to Pittsburgh in '65 as city manager to basically op

up the Chatham Center operation and expanded in '67 to include our operations in Ohio and later Milwaukee and St. Louis.

How long were you based in the Pittsburgh area?

Five years.

That ran from January of 1965 until September of this year?

Mid '65.

As part of your responsibilities did you supervise the Chatham Center operation?

From its inception.

How many years have you been in the parking business all told?

Since 1953.

What is the size of the Chatham Center facility that is operated by Meyers Parking System?

2200 cars.

Will you describe the physical location for us?

It's basically on the corner of Fifth Avenue and Washington Place with a four and a half acre redevelopment project which includes the 2200-car garage, a 600-seat theater, the largest Howard Johnson Motor Lodge which has 413 rooms, a 10-story office building and a 20-story apartment building.

Will you describe what type of lease Meyers has and the obligations under the lease?

Meyers Parking System has a 20-year lease, and our obligations

yearly are $480,000.00 guaranteed.

Q In other words, Meyers' signature on that lease really represents a commitment of something on the order and magnitude of nine to ten million dollars?

A That is correct.

Q Now, I show you what has been marked and received in evidence as Exhibit 1 and show you the statements relating to Meyers Parking System and ask you if you can identify those.

A Yes, I can.

Q What is that document?

A These are assembled in New York from figures supplied to our accounting department in New York by the local operation here.

Q That is the one that you supervised?

A That is correct.

Q Are you familiar with these figures as part of your duties as supervisor in this area?

A Yes, sir.

Q Are those figures true and correct to the best of your knowledge?

A Yes, they are.

Q Were you the regional manager here when the parking tax rose in February of 1969 from a ten per cent rate to a

fifteen per cent rate both taxed on gross receipts?

Yes, sir.

Now, what were the rates that were in effect at the Chatham Center garage prior to this tax increase?

Prior to the increase we ranged from 25 cents the first half hour up to $1.75 for 24 hours. The six-to-twelve hour rate which took in most of the customers was $1.25.

Did you raise the rates in February of 1969 in response to the tax increase?

That we did.

Can you tell us what the new rates were?

The new rates, the first half hour remained 25 cents; the 24-hour rate was increased to $2.00 and the eight-to-twelve hour rate went to $1.50. In effect we increased the all-day parker by 25 cents.

Now, as the regional manager being based in Pittsburgh, what were the results that you observed after this increase was put into effect by Meyers?

We saw a decline in the number of cars using the parking facility.

Can you tell us prior to the raised rate what your experience was at the garage with regard to the morning hours?

We were turning cars away between 9:30 and 10:00 every morning Monday through Friday. After the rate increase in

February we no longer experienced this great demand.

Q Were there any results with regard to the number of employees at this facility after the increased rate went into effect?

A Yes, due to the decline in business it necessitated us eventually cutting the cashiers' staff by two.

Q Was there any change in the attendants' staff?

A Later on we cut back some attendants.

Q Did you have any conversations with the customers of the garage with regard to the effect of the rate on their parking at the Meyers' facility?

A Yes. Customers would take me aside and --

MR. BOEHM: I object, Your Honor. This is hearsay.

MR. MARKS: I think it is relevant, Your Honor, to describe the customers saying that it was because of the rate and not something else that they left the facility and went elsewhere. What we are trying to show is that it isn't possible to pass onto the customers this increased tax.

MR. BOEHM: I am not objecting to the grounds of relevancy, I am objecting because it is hearsay. I can't cross-examine -- that customer is not here.

THE COURT: You have a point there. Rephrase your question, Counselor. We will sustain your objection.

(EXCEPTION NOTED)

MR. MARKS:

Did you observe old customers no longer coming into the garage after the rate increase went into effect?

Yes, I did.

Did you observe where these customers parked their cars afterwards?

I would notice these customers' cars in lots further out from the central business district.

THE COURT: Was there any difference in the rates of the lots further up?

THE WITNESS: Yes. They are less expensive.

MR. MARKS:

With regard to October of 1969, was there an increase in wages due to a union contract?

Yes, there was.

Did you at the Meyers' facility at Chatham Center again attempt to raise the rates and pass it onto customers, if possible?

Yes, we did.

Q What were the new rates?

A The new rates again were holding at 25 cents for the first half hour and going up to a 24-hour maximum of $2.25 and increasing the eight-to-twelve hour parking to $1.75, another quarter.

Q What results did you observe as manager of this facility under your supervision after the increase?

A We experienced four to five hundred empty spaces per day after this rate increase.

Q Ultimately as a result of the falling off of the number of cars entering this facility did Meyers close off one floor of the parking garage?

A It necessitated us closing the lowest floor, and also we cut down some more of the personnel because of the lack of business.

Q Now, as of the beginning of 1970 can you tell me approximately how many vacancies there were on a daily basis at the Meyers Chatham Center facility?

A Four to five hundred cars.

Q Were you the regional manager of that facility and others in this area when the present tax went from 15 per cent up again to 20 per cent in February of 1970?

A Yes.

Q Did you discuss the possibility of raising the rates again in

February of 1970 in an attempt to try and pass on this increase?

Yes, we did; but due to the fact of the tremendous number of empty spaces in the garage we felt it was impossible to do this.

What did you feel the result would have been if you would have attempted to raise the rates?

We would have had no business whatsoever.

As of this month in September of 1970 has the rate charged by the Meyers Chatham Center facility been changed?

Yes.

What was the change this time?

We put in an early bird rate reducing the all-day parker to $1.25.

In other words, you this month reduced the rate, is that right?

That's right.

What was the purpose of that?

To get some of our customers back.

In other words, you had lost so many customers over this period of the raise increases that you are now reducing the rate in order to draw back some of the Meyers' customers who had been regulars previously?

That is right.

Q Now, looking at the 1969 and 1970 figures on Exhibit No. 1 that relate to Meyers, can you tell me whether the gross revenues increased somewhat between 1969 and the 1970 projection?

A Yes.

Q Now, apart from the parking tax item that is shown on those figures, if you took all the other expense items reflected on those charts with the expenses that Meyers incurred in 1970, would they be less than the ones that occurred in 1969?

A Yes.

Q And the revenues went up?

A Yes.

Q The net operating income on the projection for 1970 shows, despite the fact that revenues were going up somewhat and expenses were going down, the operating income was even less than it was the year before.

A That is correct.

Q What in your opinion is that attributable to?

A The parking tax.

Q And solely the parking tax?

A Yes.

Q What was that increase in terms of dollars between the parking tax in 1969 and the projection for 1970?

A 1969 was 126,000 and the 1970 projection around 199,000.

Q In other words, an increase in the parking tax alone of about $73,000.00 for that one year, is that correct?

A That's correct.

Q That more than offset the increase in projected revenues for that year?

A Correct.

Q There has been some statement here with regard to the University Health Center figures not being included in Exhibit 1.

I wonder if you could tell us what that center is and what Meyers does in that center?

A The University Health Center garage is a 430-car garage built by the Parking Authority of Pittsburgh and leased to the University of Pittsburgh Diagnostic Clinic, Presbyterian Hospital, Children's Hospital and the Eye and Ear Hospital. Meyers System operates it for the University group on a flat management contract.

Q What does Meyers get paid?

A We are paid $625.00 per month.

Q And Meyers has no lease?

A That is correct.

Q How long is that Meyers contract for?

A Three years.

Q When was that facility opened?

A We opened that facility December 28 -- the latter part of December of 1968.

Q As part of its operations does Meyers get reimbursed by the Center including taxes?

A Yes.

Q Does Meyers prepare an operating report for the Center?

A No.

Q This is a Public Parking Authority operation?

A Yes.

Q To your knowledge does the Parking Authority pay any real estate taxes on this facility?

A Not to my knowledge.

Q Even with that tax exemption are you aware of whether the Health Center group has shown any profit on this University operation?

A I had been told by the controller of Presbyterian Hospital -

MR. BOEHM: I object, Your Honor. This is hearsay.

THE COURT: Sustained.

(EXCEPTION NOTED)

BY MR. MARKS:

Q Are there any policemen stationed at Chatham Center?

A No.

Q Does the City render any special services to the Chatham

Center garage or area?

No.

When there are events of one kind or another that attract large numbers of people to the Civic Arena, does that result in increased parking at the Chatham Center Garage?

Yes, it does.

In that connection does the city provide additional police for that?

They do not. If I need additional police I have to call for them and pay for them ourselves.

When you say additional police, who do you usually call for?

Their off-duty policemen.

You mean city policemen who you pay money on their off-duty hours to pay for this?

Yes.

MR. MARKS: I have no further questions.

- - -

CROSS-EXAMINATION

MR. BOEHM:

Mr. Smith, you have said that you contract with the owners, I suppose, of the land that you lease there at Chatham Center for a $480,000.00 guarantee at your rental, is that right?

Yes, sir, plus a percentage.

Q Plus a percentage of what?

A That is the guarantee. There is a percentage of the gross, escalations over and above that.

Q Of the gross what?

A Revenues.

Q Do you have in front of you Exhibit 1, sir?

A Yes, sir.

Q Would you take a look at the sheet following your financial statement titled "Meyers Parking System Operating Statement, Chatham Center Garage"?

A Right.

Q Your revenues for 1968, 1969 and 1970 as projected are constantly increasing, right?

A Yes.

Q And your rentals, however, are decreasing: 1968, $582,000.00 so on. The projection for 1970 is five thirty-seven. Can y explain that in view of what you said about your guarantee plus a percentage --

A The real estate taxes should really be a part of rent.

Q Real estate taxes are a part of rent?

A There's an escalation clause in the lease for real estate taxes.

Q You have treated the real estate taxes on that statement separately, haven't you?

Mr. Hazzard pulled them up, yes.

How can that be if you have already taken into consideration real estate taxes, how does the real estate affect the other figures I mentioned with respect to your revenue and your rent?

The overage rental is calculated after the tax escalation.

Overage rental is calculated --

After the tax escalation.

The difference in your operating income, Mr. Smith, as shown on that sheet is really accounted for because of your increase in payroll and the increase in your --

Parking tax.

Your taxes, right?

Parking tax.

Real estate taxes, not parking tax.

What was the question again?

The loss shown on your operating income is accounted for by reason of the increase in the real estate taxes and your payroll?

Well, if you will note that the --

MR. MARKS: What year are you talking about?

MR. BOEHM: I am talking about 1968 and 1969, the actual figures shown on the sheet.

THE WITNESS: I would say it's the parking tax.

MR. MARKS: Your Honor, the figures, I think, speak for themselves. They are in the record.

Y MR. BOEHM:

You don't want to add or explain anything further than what is set forth there with respect to that question for 1968 and 1969?

I think it shows right (indicating) here.

Now, you say that you have noticed that cars that were formerly parking at your garage are now parking at other lots farther out from the city?

Less expensive facilities, yes.

Do you mean to tell me that you recognize as the superintend of that entire, -- what is it, a five-level garage?

Six.

You have six stories, six floors which you park cars on and as the superintendent you personally observed that some of t cars that you formerly parked are now parking in other lots?

I recognized some of the cars of people that had been there from the very beginning. I was there when the garage opened and knew and met some of these people personally.

Where did you see their cars parked after you raised the rat

I've seen them in the Arena lots and the lot behind the church.

How many cars are we talking about that you personally observed?

Oh, I'd say 25 that I recognized.

Twenty-five?

There are many more than that.

How many cars do you park per day right now at Chatham Center, average?

We're averaging about 2200 cars.

Now, your early bird rate, which I am 100 per cent in favor of, I have been taking advantage of it, I used to be a dollar-seventy-five man, now I am a dollar-and-a-quarter man, doesn't say, however, on the sign that you have posted there at the cashier's window how long it is going to be in effect. Have you committed yourself in any way to your customers on how long that early bird rate will be in effect?

No.

So if you wanted to, you could after this case were finished eliminate that rate?

I suppose, but I would not anticipate doing so.

And the first day that rate became effective was what?

I believe it was the 4th of September.

Sir, you mentioned that when you raised your prices you

noticed that some of the cars instead of parking at your garage were parking at other garages, and I think Judge Wessel asked you whether the prices were lower at those other lots.

A Yes.

Q And you said yes that was true?

A Yes.

Q The difficulty I have is in coming, then, to the conclusion that the increase in the parking tax, as you say, was the sole reason for the people not parking at your garage. It seems to me that --

MR. MARKS: I object. If there is a question Mr. Boehm has, I would be glad to let the witness answer, but --

THE COURT: Would you put your question to the witness rather than going into a lengthy discussion as to what you propose to ask?

MR. BOEHM: I am sorry, Judge, if I was doing that.

BY MR. BOEHM:

Q The question is this: How is it that you come to the conclusion that the sole reason for people leaving your garage and parking elsewhere is the increase in the city's

parking tax when you have admitted to Judge Wessel that the cars that left you after the increase in the parking tax went to lots that charged a lesser rate than you were charging?

MR. MARKS: I object. That is not what the witness said. He said when he raised the rates to try to pass it on they lost customers. He didn't say it was the parking tax that caused the loss in customers, he said it was the raise in rates. He said the parking tax affected their net income.

MR. BOEHM: I guess the record will speak for itself. Let us ask the gentleman what he said before.

MR. BOEHM:

Did you say --

MR. MARKS: I object to that. You have the record here.

MR. BOEHM: If Judge Wessel wants to, we will have the reporter go back to his testimony.

THE COURT: Rather than waste a lot of time going through this, answer the question put, if you can.

We will overrule your objection and note the exception.

(EXCEPTION NOTED)

THE WITNESS: The increase in rates seemed to force customers elsewhere, to go elsewhere.

BY MR. BOEHM:

Q What do you mean when you say it seemed to force them elsewhere?

A Well, prior to rate increases I was turning cars away doing over 3,000 cars a day, turning cars away by nine-thirty, ten o'clock in the morning. After the rate increases we no longer turned cars away and are now doing approximately 2200 cars a day.

Q Can you say that the sole reason for automobiles leaving your garage and parking elsewhere after a rate increase, and that is the rate increase as you say after the parking tax increase, is that parking tax?

A It is the increase in my rates caused by the parking tax.

Q It is the increase in your rates.

Just because the parking tax increases doesn't necessarily mean that you have to raise your rates?

A That is correct. I did not feel that I was able to raise my rates this past February.

As a matter of fact, I think you were in the courtroom this morning when Mr. Stabile testified with respect to a number of his lots on which he didn't raise his rates after the parking lot tax was put into effect, and you heard what the results of his operation were. It is possible, I suppose you have noticed also with respect to your operation, that you can actually realize a greater net return by parking more cars at a lesser rate than you can at parking less cars at a higher rate?

MR. MARKS: I object to that because the testimony has been exactly the reverse. He has testified that they have been able to park fewer cars and that the net operating income has gone down. Mr. Boehm has just said the reverse and says, "Isn't that true," and I don't think that is fair.

MR. BOEHM: No, I am not. I didn't say that.

MR. MARKS: I withdraw the objection.

THE COURT: If the witness can answer, he may.

THE WITNESS: Would you ask it again, please?

BY MR. BOEHM:

Q Another way of putting the question would be that it is possible for you, and you have noticed this in the past, that you can actually realize a greater return with a lesser rate thereby attracting more cars than you would with a higher rate discouraging people from parking there and parking elsewhere?

A I would not necessarily say that we would have a greater return.

Q What you want to do in your operation is maximize the use of those six floors which you have available?

A That is correct.

Q And you want to do that at a price at which you are able to make a decent return?

A Hopefully.

Q Is it possible for you to do that, to make a greater return with a lesser rate?

A Not necessarily.

Q Not necessarily. I agree with you there.

Are you saying, sir, that you attribute the decrease in your operating income as shown on that statement solely to the increase in the parking tax?

MR. MARKS: For what years? You are talking about the 1969-'70 year or 1968-19

MR. BOEHM: 1968-1969.

THE WITNESS: Primarily so.

MR. BOEHM:

But not solely?

No.

You recognized the fact that your other costs have increased substantially, also?

We had some labor increases, but the biggest single one I believe you'd find is the parking tax.

You had repairs of $1,000.00, you had something under the category of "Other" as $5,000.00.

Repairs and maintenance, $20,000.00.

MR. MARKS: The figures are there, if we could save some time.

MR. BOEHM:

You have $49,000.00 under the heading of "Real Estate Taxes." Well, you will note that the rent in '69 over '70 is a lesser figure if you combine the two, the rent and the real estate taxes. The increase in rent and real estate taxes together is not the same or is not as much as the increase in the parking tax.

What you are saying is the rents went up $27,000.00, approximately?

Whatever it amounts to. Yes, that looks about right. Right.

Q Isn't that what your loss in operating income was comparing 1968 and 1969?

A 29,000?

Q Yes.

A But I think you have a parking tax in there, too.

MR. BOEHM: That is all. Thank you, Mr. Smith.

MR. MARKS: I just have one or two questions, Your Honor.

- - -

REDIRECT EXAMINATION

BY MR. MARKS:

Q Let us look at 1969 and the projection for 1970. The ite attributable to real estate remains constant, is that corre

A Yes.

Q If you take all the other expenses except for the parking tax, you find that the total expenses decrease slightly?

A Yes.

Q Say $10,000.00?

A We have tried to make it a bit more efficient trying to cut payroll and other things.

Q Despite the fact that expenses go down and revenues go up, the only significant change is in that parking tax, isn't that right?

That's correct.

And that is --

And the operating loss.

That is another $72,000.00 that is added on in your expenses in 1970 that wasn't there in 1969, is that correct?

That's right.

And there has been no change at all in that real estate tax figure?

Right.

MR. MARKS: I have nothing further, Your Honor.

THE COURT: Is there any further cross-examination, Counsel?

MR. BOEHM: I may have one more question, Judge, if I can have the Court's permission.

THE COURT: All right.

- - -

RECROSS-EXAMINATION

MR. BOEHM:

Take a look at your revenues for 1969 and your projection for 1970.

That shows an increase in revenue?

Correct.

Would you say that your expenses would increase proportionately

to the increase in revenues?

A Not necessarily. As I stated just a second ago, we have tried to minimize, streamline our expenses as much as possib

MR. BOEHM: That is all I have. Thank you.

MR. MARKS: I have nothing further.

MR. BOEHM: Oh, excuse me.

BY MR. BOEHM:

Q You have paid the -- you are paid current, aren't you, the City Treasurer for your parking taxes?

A I believe so, under protest.

MR. BOEHM: That is all.

MR. MARKS: I call Seymour Gline, Your Honor.

- - -

SEYMOUR P. GLINE, called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MARKS:

Q Will you state your address and occupation?

A I live at 370 East Seventy-Sixth Street, New York City, and I am Vice-President of Meyers Parking Systems.

Q What are your responsibilities at Meyers?

I'm in charge of operations throughout the entire chain.

How many locations or facilities are there within the chain?

A little over 200.

Are you in charge of all the regional managers?

Yes. We have nine regional managers that report to me.

Can you tell us what your experience is in the parking industry?

I have been in the parking industry for approximately 25 years.

Will you give us some of your background?

I operated a chain of 20 odd garages that I owned independently, and for six years I was executive director of the Metropolitan Garage Board of Trade which is the parent organization for garages in New York City.

Have you also held positions with the New York Garage Owners Association?

I was President of that for six years.

Have you also had experience in city-wide labor negotiations in New York with regard to the parking industry?

Yes. I've been chairman of the Labor Committee for 12 years in New York City.

Can you tell us the scope of Meyers' operations in the sense of how many employees you are responsible for in the supervision chain?

A Close to 2,000.

Q Can you tell us where Meyers' locations are spread?

A It spreads from Hawaii all the way across the United States and into Puerto Rico.

Q Can you identify a few major facilities you are familiar wit

A We operate the Century Plaza Complex in Los Angeles, it consists of about 7500 parking stalls; the Lafayette Plaza Garage in Bridgeport, Connecticut, 2100 stalls; stadium garages in St. Louis with a combined total of 2200 stalls.

Q Is that a redevelopment operation?

A Yes.

Q Has Meyers often participated in redevelopment projects?

A Yes.

Q Does Meyers also operate garages in the Pan Am Building and Seagrams Building and Madison Square Garden in New York?

A Yes, and the No. 1 and No. 2 Plaza; these are two landmarks in New York City.

Q When did negotiations with Meyers in regard to leasing the Chatham Center garage take place?

A 1959 and '60.

Q Did the commitment to lease that go into operation before there was a ten per cent parking tax in effect?

A Yes.

Q Can you explain based on your experience in this industry

How projects like Chatham Center are financed? How do people go about building these redevelopment centers?

We are called upon by developers, and a feasibility study is made as to the nature and type of garage that might be required by the particular development. A study is made as to costs, and then we offer a guaranteed rent to the developer over a period of between ten and twenty years plus a percentage at certain fixed overages.

What does the developer do then that he has a guaranteed income coming in under a Meyers lease?

Meyers being a national company and being rated triple A, the lease becomes an instrument for him to procure a loan in developing the project.

Is it possible for him to obtain major financing without a guaranteed income for underlining leases like the one Meyers has?

Absolutely not.

What commitments are there in the Chatham Center that enabled the financing to be developed so it could be built?

We originally negotiated close to $10,000,000.00 in guaranteed rents.

That is for Meyers?

From Meyers.

In addition to that was there also an arrangement worked out

between the Chatham Center operation and Howard Johnson's?

A In addition to that Howard Johnson's also guaranteed a certain amount of money on a franchised basis to the developer.

Q On the basis of those two guarantees was the developer able to go out and get the financing so the Chatham Center redevelopment could be set up in Pittsburgh?

A That was the cornerstone for the entire redevelopment.

Q In your opinion based on your experience in this industry, could Chatham Center or developments like it be built today in Pittsburgh with a 20 per cent parking tax?

A Absolutely not.

MR. BOEHM: I object to the question, Your Honor.

MR. MARKS: I will lay the underlying basis for the opinion, Your Honor; but I think it is crucial in this case.

THE COURT: Very well.

(EXCEPTION NOTED)

BY MR. MARKS:

Q Can you give us the factors that go into that conclusion that you have drawn based on your opinion as an expert in this field?

A Well, number one, it's plain for anybody to see that there

is no other national chain in the United States that's in the City of Pittsburgh. Ever since this tax has come into being all major chains have steered away from Pittsburgh as if it was a desert.

MR. BOEHM: The reason for my objection, Your Honor, is really whether Chatham Center could be built today with the 20 per cent parking tax is not an issue in this case. The issue is considering the fact Chatham Center exists, considering the fact all these other parking lots exist, can they survive with the 20 per cent parking tax. We are in a real speculative area saying whether they can be built today.

THE COURT: We understand that. We want to get the surrounding circumstances to what actually leads up to the issue here. We are concerned about the parking industry and their respective projects, whether or not they can stay in business and operate at a profit with this parking industry tax. We are aware of what is involved.

Proceed.

BY MR. MARKS:

Q Would Meyers Brothers today consider building an operation like Chatham Center or any other parking facility operation that could provide the basis of financing for a redevelopment project with the 20 per cent tax in effect?

A We could never consider it at all.

Q Would your answer be the same with regard to a 15 per cent tax?

A Absolutely not.

Q Has in fact Meyers been approached by people in Pittsburgh to expand their operations here and to provide the basic underlying financing for two new projects?

A Yes. I was involved with the Shadyside Hospital and the American Oil Company development in Shadyside, and when we clamped the 20 per cent parking tax into our figures there was no possible way it was going ahead and we dropped out of the entire --

MR. BOEHM: I object for the same reason, Your Honor. It is irrelevant, incompetent and immaterial.

THE COURT: We will sustain your objection.

(EXCEPTION NOTED)

MR. MARKS: The reason that these

operators can't participate in these buildings is because with a 20 per cent tax there is nothing left for profit, that is a confiscator situation and that is why, as Mr. Stabile has previously testified without any objection, that he didn't go into that hospital situation and now Meyers was also approached and they couldn't go into that hospital situation because the 20 per cent tax is so confiscatory that they couldn't put their name on a $10,000,000.00 guarantee to provide the base for financing.

THE COURT: We get the message, Counselor; but we still sustain the objection.

MR. MARKS:

Now, did Meyers also make the decision not to enter Pittsburgh on an Amoco, American Oil Company, project? For the very same reason.

MR. BOEHM: I object for the same reason, Your Honor.

MR. MARKS: May I ask one question further on this line, then I will drop it, Your Honor.

MR. MARKS:

Q Was there any other factor in these negotiations, in both negotiations, aside from the parking tax that led to Meyers not going in?

A None whatsoever.

Q And if the parking tax were not in existence, 20 per cent, would Meyers today have tried to finance both of those developments?

A Definitely.

Q Based on your experience as a national operator with the number of operations that Meyers has, which is over 200, is it financially feasible for a major operator to do business where there is a 20 per cent tax and realize a profit?

A Absolutely not.

MR. BOEHM: I object, Your Honor. The records are here, we know what the profits are, we know what the losses are. We don't need an opinion from the witness. He has to back up his opinion and he will do that by showing statements already in evidence.

BY MR. MARKS:

Q Based on your experience, are you aware of any major parking operator whose financial statements would reveal that they can make in excess of 20 per cent or more of the gross

in the United States?

MR. BOEHM: I object, Your Honor. His awareness of what other operators might be doing is not relevant here unless -- he can't reply in the negative, anyhow. If he can reply in the affirmative and give us some information it would still be hearsay.

MR. MARKS: It is common sense that if no operator in the country makes 20 per cent and you tax him 20 per cent he makes nothing.

THE COURT: You have proven your case without your witness.

MR. MARKS:

May I have a "Yes" or "No" answer?

No, I am not aware of any major parking operation that has 20 per cent.

Prior to Meyers entering into a situation where it might participate in the long-term lease, what are the factors that it analyzes in determining whether to make a business decision to go ahead?

Well, a feasibility study is made and a cost project is made, competition is studied, traffic patterns are studied, all these items are cranked into a situation and we see what we can guarantee the man who is running the project and what we

can live with.

Q Does Meyers prior to entering one of these projects envisio a certain minimum rate calculated on the basis of a percenta of gross revenues that it expects to be able to return from this operation before it will consider going in?

A Yes.

Q Will you tell us what that minimum rate figure or span is?

A Depending on the size of the investment and depending on the length of the lease, I would say it requires between ten and fourteen per cent.

Q Is that a minimum?

A That's a minimum.

Q And is that prior to the payment of taxes on that?

A Definitely.

MR. MARKS: I have nothing further.

- - -

CROSS-EXAMINATION

BY MR. BOEHM:

Q Mr. Gline, the last answer which you gave with respect to the ten to fourteen per cent return, you conditioned that on the size of the investment, is that right?

A The size of the investment and the length of the investment.

Q And you really can't calculate the percentage of return that you expect to receive from a particular operation unless you

those two factors?

Yes.

MR. BOEHM: I have nothing further. Thank you.

- - -

REDIRECT EXAMINATION

BY MR. MARKS:

Talking about investment in that last question Mr. Boehm asked you, you are talking about the investment to include not only a building but a long-term lease where you are responsible for eight to ten million dollars?

Yes. When our company signs a lease we are committed for that amount of money from the very day the lease is signed, be it two million, four, eight million, ten million. That's our investment, we're committed to it.

MR. MARKS: Thank you. I have nothing further.

THE COURT: You may step down.

MR. BOEHM: I have two more questions, Your Honor, of Mr. Smith, if I may, before he leaves.

THE COURT: Come back, Mr. Smith.

- - -

PETER B. SMITH, being previously duly sworn, was recalled and testified further as follows:

RECROSS-EXAMINATION

BY MR. BOEHM:

Q I am not going to keep you long, Mr. Smith.

A That's fine.

Q I am not sure whether the record shows whether those projections that are on your sheet you were referring to for 1970 were your projections or Mr. Buzzard's.

A Mr. Buzzard's.

Q They were Mr. Buzzard's?

A Yes.

Q So, so far as you know they were arrived at in the same way as the other projections were made?

A As far as I know.

Q And the other question I had for you was in connection with your early bird rate, what have you done to publicize the fact that you have this lower early bird rate which went into effect recently?

A We advertised on four radio stations and our advertising is the Duquesne and Robert Morris papers.

Q Radio stations and the Duquesne University and Robert Morris

A Newspapers and bulletin boards.

You don't have Exhibit 1 in front of you now, do you?

No, I don't.

Where are your interest costs reflected on that statement?

Interest costs -- I believe they are in the "Other" --

Under the heading of "Other"?

Yes.

MR. BOEHM: That is all. Thank you.

MR. MARKS: I have nothing further, Your Honor.

(Plaintiffs' Exhibit No. 11 was marked for the purpose of identification.)

MR. BOREMAN: Your Honor, at this time I want to offer in evidence Plaintiffs' Exhibit 11 which is the parking study made of the Pittsburgh Central Business District made for the Parking Authority of Pittsburgh by Wilbur Smith and Associates.

MR. BOEHM: I have read it, Your Honor, and I am very happy to admit it into evidence.

THE COURT: Very well, we will admit it.

(Plaintiffs' Exhibit No. 11 was received in evidence.)

MR. BOREMAN: Your Honor, I have, I believe, one more witness.

- - -

DONALD M. MCNEIL, called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BOREMAN:

Q State your name and address, please.

A Donald M. McNeil, No. 5 Colonial Place, Pittsburgh 32, Pennsylvania.

Q What is your occupation?

A I'm a consulting engineer specializing in traffic, transportation and parking problems.

Q State your educational and business background with respect to these fields.

MR. BOEHM: Your Honor, could I have an offer as to what the Plaintiffs intend to prove through the testimony of this witness?

MR. BOREMAN: Your Honor, Mr. McNeil is possibly the leading and foremost expert on parking and traffic in the City of Pittsburgh. He was formerly traffic engineer for the City of Pittsburgh.

MR. BOEHM: I admit he is qualified.

MR. BOREMAN: I think this case is emanately suited for expert testimony on the

questions of parking and its qualities, characteristics, its relationship to traffic congestion, its relationship to the function of the Parking Authority. All the issues in this case this man is emanately qualified to tell us about. I think if there was ever a case suited for an expert witness in this field of parking, I think this is it.

MR. BOEHM: I disagree 100 per cent, Your Honor. I think that testimony on traffic congestion can have no bearing on the issues in this case at all. There is no legal requirement that we prove that we have expenses insofar as police protection or that we have to show a valid reason for enacting a general revenue tax like a parking tax. I don't see how it can help the issues in this case.

MR. BOREMAN: Your Honor, this is the very heart of the case. Counsel evidently misunderstands the point of this case completely. The heart of our case is that this ordinance violates uniformity because it has no reason for the basis for the violation

made. This is the very issue in this case: Is there a reasonable basis for picking out the parking industry from all other business? When he says that the city doesn't have to give any reason, I don't think it could be further from the facts. The Courts have said while they will not review the judgment of the legislature they will determine whether there is a reasonable basis for the ordinance or whether it is arbitrary. This is what an expert's testimony can give.

MR. BOEHM: The Courts can't determine whether there is a reasonable basis for the ordinance, but the Courts can and must determine whether there is a violation of the uniformity clause of the Constitution.

THE COURT: Your objection is overruled. Proceed. We think this is germane to the subject.

(EXCEPTION NOTED)

BY MR. BOREMAN:

Q State your education, experience and background in this field parking and traffic?

A I graduated from the University of Pittsburgh with a degree

of Bachelor of Science in civil engineering after which time I --

What year?

In June of 1926 at which time I was immediately employed by the City of Pittsburgh as an assistant traffic engineer.

I continued in such position until about 1932 at which time I was promoted to the position of traffic engineer and served in said capacity until I resigned on February 1, 1952.

After that date I immediately became engaged in consulting work and have done numerous traffic engineering, parking and other studies for many, many municipalities, many private organizations within the tri-state area of Pittsburgh and in the general area of Pennsylvania as far east as Harrisburg and into Ohio and West Virginia.

Will you state for what communities you have made parking surveys and parking studies?

I have a list here. I'll read them off. It happens to have better than sixty some communities.

MR. BOREMAN: To save time, Your Honor, Mr. McNeil has a brochure prepared. I will offer it in evidence.

(Plaintiffs' Exhibit No. 12 was marked for the purpose of identification.)

MR. BOREMAN: I offer in evidence

Plaintiffs' Exhibit 12 being a statement of background and qualifications of the witness, Don McNeil.

MR. BOEHM: I have no objection, Your Honor.

THE COURT: We will admit it.

(Plaintiffs' Exhibit No. 12 was received in evidence.)

BY MR. BOREMAN:

Q From this resume, Mr. McNeil, it appears you have been advisor and consultant not only for this municipality but for many private corporations in their feasibility studies as to engaging parking facilities, is that right?

A Yes, sir.

Q I believe also that you were the technical advisor who prepared the first report in 1945 which led to the creation of the Pittsburgh Parking Authority.

A Yes. I'm somewhat credited as one of the daddies of the Pittsburgh Parking Authority.

Q You have a copy of that report?

A I do.

Q Will you tell us for whom you made the report?

A This report was made by the Pittsburgh Regional Planning Association by the Allegheny Conference on Community Deve

and the report is dated 1945 and 1946.

What was the purpose of the report?

The purpose of the report was to show the critical shortage of parking in the city and the need for something to provide the needed parking spaces for the welfare of their community.

At that time how many parking spaces were required by the downtown area or the city itself?

At that time we had approximately 135 parking facilities in the area, and these facilities were providing approximately 13,000 parking spaces; and after extensive study as indicated by that report, the report concluded and showed that Pittsburgh would need 26,000 spaces.

But the significant thing of the report was that it showed two things: Of those 26,000 spaces, approximately half were needed for what we term short-time or business-producing traffic, and the other half were what we deemed as long-time or employee-type parking.

You are familiar with Plaintiffs' Exhibit 11, are you not, the survey made for the Pittsburgh Parking Authority?

Yes, I am.

Bringing it up to date to the year 1969?

Yes.

You have read that survey?

Yes, sir.

Q And based on that survey and your other studies in this field, are there still parking spaces required in the downtown area of Pittsburgh?

A Yes, sir.

Q What is the shortage?

A The second paragraph of this report reads: "There is a present deficiency of about 4100 spaces in the survey area."

Q That is downtown Pittsburgh?

A That's in the central business district which will increase to approximately 7500 spaces based on developments that are currently underway, and based on other proposed projects the deficiency is anticipated to further increase to about 10,500 by 1979. Those figures substantially are the studies of 1945 and 1946.

Q Can you give us the figure, the total number of parking spaces in downtown Pittsburgh or what is called the central business district of Pittsburgh? I believe that study --

A There's approximately 23,500 spaces in Pittsburgh today on off street. And there's another 756 spaces on street making a total of about 24,300 spaces.

Q How many spaces does the Parking Authority serve?

A Slightly over 6100.

Q Which leaves about how many for private operators?

A Well, private operators represent three-fourths of the

of Pittsburgh of those that are there now.

The present existing spaces --

Are three-fourths, 75 per cent.

Would that be about 18,000 or more?

Well, it would be 18,200, roughly.

What is the number of spaces represented by the present Plaintiffs in this suit?

The present Plaintiffs in this suit, approximately 17,000.

And, of course, that includes some spaces outside the central business district?

Yes, sir, a few.

So out of a total of 24,000 spaces in the City of Pittsburgh, 17,000 are represented by the Plaintiffs in this case?

17,471, actually.

Mr. McNeil, in the course of your work as a consultant in the parking industry and as the consultant and advisor and technical planner for the Parking Authority, have you had occasion to study the subject of traffic congestion and its causes of the City of Pittsburgh?

I live here, I travel through Pittsburgh almost daily, my love is here in Pittsburgh, that was my first job, naturally I'm deeply concerned with Pittsburgh and its traffic --

Have you made studies with respect to the subject of traffic congestion and its causes?

A Yes.

Q. Will you state what your conclusions are and how you arrive at them on the subject of traffic congestion?

A Traffic congestion -- and unfortunately erroneously used many times -- traffic congestion is whenever the steet system is either not used properly or has inadequate physical conditions to permit the traffic to move thereon. For example, let us say as we approach an intersection and we have a large right or left turn movement of traffic conflicting with pedestrian traffic and it can't readily move until pedestrian traffic passes out of the way, you obstruct one or two lanes of traffic, depending on whether they are right turns or left turns. For example, over at the William Penn Hotel you have numerous vehicles coming to discharge people, you have airport limousines stopping to pick up commuters. It is a rare occasion that you can ever get the full use of the curb lane of Grant Street because of the obstruction of the need for the life of the hotel. I'm not saying it shouldn't exist, the hotel needs it to exist, for a matter of fact.

Go over and watch at Seventh Avenue at the Bell Telephone Building and watch the large number of men waiting to pick up their girl friends or husbands waiting to go pick up their wives. It's common you almost need an officer to keep that

lane clear.

Take bus stops, take the loading and unloading of transit vehicles. You constantly are obstructing one lane for the movement of traffic. Those are the things that create our congestion in our business district.

Now, with relation to parking garages, how are traffic congestion and parking garages related?

It's ridiculous in my opinion to label congestion as a factor on parking garages. Sure there may be an occasion, but they are not the principal factors of congestion. The others that I have cited are many, many times greater.

Does a parking garage such as, let us say, Stanwix Auto Park or the parking garage at I. B. M. or Gateway Towers or any of those, are they the cause of traffic congestion?

When you say traffic congestion, you mean on the street?

On the streets, I am talking about.

Rarely. I sat and heard them questioning Mr. Stabile this morning or Mr. Shepard this morning about the congestion down on Stanwix Street, --

MR. BOEHM: Don't get mad at me.

THE WITNESS: -- the officers being needed there. That officer is needed to keep the people from stopping at Horne's. Go down there and watch it. It's not the garage, it's the people stopping

at Horne's. That officer is constantly over there saying, "Come on, get out of here and let us have the curb lane so we can move."

BY MR. BORLMAN:

Q Do you know of any situations where extra police are stationed at parking garages to service any traffic?

A No, that is not their specific assignment. They may have to go there if somebody insists on trying to get in when there is a "Full" sign up. He may have to go down there and order the car away.

MR. BOEHM: I object to the last question and answer, Your Honor. This witness, although he is qualified, is not qualified to testify on what the assignment of a particular police officer is.

BY MR. BOREMAN:

Q Mr. McNeil, what other businesses in Pittsburgh besides, let us say, the Hilton Hotel draw traffic congestion?

A Why, department stores. You have numerous cars coming into town to bring people to department stores, you have office buildings, numerous cars coming to office buildings, the hotels I've already commented about, you've got people coming to the banks, you've got people coming to attorneys for advice, you've got people coming to the City-County Building and the Courthouse.

THE COURT: I am sure that would render a lot of congestion.

THE WITNESS: That's right.

MR. BOREN: And confusion.

THE WITNESS: It's these buildings that attract these automobiles. The parking garages aren't the generators of this parking, it's the buildings, the life of the community that's the generator for these vehicles and this congestion.

MR. BOREMAN:

I suppose the restaurants and theaters, also.

Oh, certainly.

Mr. McNeil, is it the parking garages that attract all these cars into town?

No.

It has been said that the cars come into town because there are parking garages, not the other way around, parking garages are there because the cars come into town. Which is it?

Thank God the parking garages are there or many of the people wouldn't come into town.

Is it a fair statement to say that cars come into town because the parking garages are there?

A Those cars come into town primarily to do business and transact trade and make up the life of this city.

Q And if they weren't there, the parking garages, what would be the situation as far as traffic congestion is concerned in downtown Pittsburgh?

A Well, if the people insisted on coming in, Lord help us, you wouldn't be able to move any traffic on the streets, you'd have the most horrible congestion you have ever seen.

Q What do the parking garages do with respect to congestion?

A They alleviate congestion, in my opinion. They take the traffic off the street.

Q It is fair to say the function of the parking garages is to relieve congestion, is that true?

A When I went down to the lecture to appeal the Parking Authority, that was our principal reason for the Parking Authority.

Let me read my report. Page 4 of my report which was the granddaddy of the Parking Authority -- and I was labeled a socialist and communist because I went down there and fought for the Parking Authority. It's necessary. It must be there.

Here is what we said, and I'm not talking against parking authorities, we need more. Quoting on Page 4: "In order to avert disasterous traffic congestion under the

impact of the greatly increased traffic volumes anticipated, the traffic capacity and efficiency of the triangle must be increased by every available means, the most essential of which is the provision of adequate off-street terminal storage facilities."

That's as true today as it was then.

In the Parking Authority Act there is a provision that says that there is a parking crisis, speaking of the time the Act was passed in 1947.

Was there a parking crisis in Pittsburgh?

Certainly.

The report said one of the ways of alleviating that was the joint effort of the Parking Authority and private operators.

Was that your recommendation?

Yes, sir.

Can the function of parking in Pittsburgh and its necessary functions be performed by the Parking Authority alone or is there the need for private operators?

I don't think the Parking Authority financially can solve this problem. I think the city has greater worries the day that we bankrupt our private operators.

I believe you have stated you were consultant to other municipalities. Have you made other recommendations to other municipalities with respect to the erection of parking

garages to relieve congestion?

A Since leaving the City of Pittsburgh in '52, February, I have made better than -- I have made feasibility reports for many, many communities. Better than several hundred million dollars has been expended on parking programs.

Q What have been your recommendations in many of these cases?

A That money has been spent and those facilities have been developed and those communities are happy.

Q Mr. McNeil, in the course of your studies have you made a study or do you know the number of traffic policemen that are necessary to police downtown Pittsburgh?

A Yes, I have. This was of constant concern to me when I was in the services of the city, and I was interested in the subject.

Q Now, in 1962 how many traffic policemen were there?

A The complement of the Bureau of Police in 1962 was 1268, total, of which 228 were in the Traffic Division and there were 25 supervisory personnel.

Q There were 228 in the Traffic Division?

A Yes.

Q In 1970 what are the figures?

A In 1970 there is a complement in the Bureau of Police, according to the budget, and I don't know that all the vacancies are filled, of 1500 of which 116, about half,

are in the Traffic Division, and of those in the Traffic Division 14 are supervisory.

So presumably 102 are traffic policemen?

No, it would be 116 plus 14, 130 total in the Traffic Division.

Now, the Traffic Division is made up of -- at least was when I was here, was made up of motorcycle patrol as well as the corner man, and primarily the corner man being in the downtown area.

Are you saying that in 1970 there are 116 corner men?

No, I said there's 116 men in the Traffic Division made up of the motorcycle patrol and corner men.

In 1962 what was the figure?

228.

MR. BOEHM: Are you talking about total city-wide?

THE WITNESS: Yes, sir.

M. BOREMAN:

Mr. McNeil, as an expert in this field can you give us a little insight or discussion as to what the differences are, if any, between the operation and function of the Public Parking Authority garages and the private operators' garages? Is there any difference?

Generally I would say there is none with reference to the

operation.

Q They perform the same function, do they not?

A Yes, sir.

Q And they have employees in the same union?

A Yes, sir.

Q And their costs are generally the same, right?

A Yes, sir.

Q So that is it your opinion that what the parking garage or the private operators do in function and in operation is exactly the same as the Parking Authority?

A Basically, yes. I'd say it's the same.

Q Do you know of any difference outside of the method of financing a new building?

A Except for one item, and I think the public garages endeavor to cater more to the short-time parker than the long-time parker. But as far as a car coming in, giving him his ticket, collecting his money, taking care of his car, that's all the same.

Q Are they really doing that or is the situation pretty much the same?

MR. BOEHM: I object to that question. He is leading his expert now. In fact, he is arguing with him a little bit.

E. BOARDMAN:

Do they actually accomplish what they are endeavoring to do, or do they do the same?

The Parking Authority has eight garages. Possibly in one or two they are achieving that objective, but in general they are doing the same.

It has been said that if there were no parking garages in Pittsburgh automobiles wouldn't come to town and then we would have people compelled to patronize mass transit and everything would be taken care of by mass transit.

What do you think of that?

I recalled the days when we had garage strikes, and I recalled the days when we had transit strikes, and I can tell you either one are very unpleasant. If you don't have garages -- I don't think we can accommodate it with the present transit facilities that we have. Further, our transit facilities do not spread into the suburbs sufficiently to accommodate the need of the people to come into downtown Pittsburgh.

Let us assume there was a very fine mass transit system comparable to some of the cities that have accomplished this. Would there still be the need for parking in downtown Pittsburgh and would the need be one that private operators are required to fulfill along with the Parking Authority?

A I think so.

Q Have you made any study with respect to whether or not this parking tax can be passed on by raising the rates? If so, what are the results of your study?

A There is a point of no return. I think today the cost for short-time parkers for business-producing traffic is such that we are discouraging the shopper from coming to downtown Pittsburgh. And every time you add more tax you drive that much shopping business away.

Q Can you tell us how you know that?

A Pardon?

Q Can you tell us how you come to that conclusion?

A I happen to work for many big developments such as South Hills Village, I laid out the traffic and I laid out the parking, such as Monroeville Mall, I laid out the traffic and parking. I have done work in many places all with the objective of weeding traffic and business to those areas. There is only so much retail trade and so much business in a community and so much money in your pocket. You are going to spend so much for goods and so much for food, and as you do that they are going to those areas that provide the greatest convenience. And the greatest convenience today is in many places in these suburban shopping centers. It certainly costs nothing to park in those areas.

Mr. McNeil, you were retained by the Plaintiffs to make this (indicating) Plaintiffs' Exhibit 1 containing the financial figures of the Plaintiffs involved here?

Yes, sir.

And Mr. Buzzard is employed by you as the statistician, and he did the detailed work with respect to its preparation?

Yes.

Did you participate in its preparation?

Yes.

In what way?

Almost daily Mr. Buzzard would talk to me when it came to arranging the forms for simplicity so they could be readily understood by whoever wanted to read them. I had my hands in that, as we had problems with some figure we would discuss it. It was just in a general supervisory capacity that I worked with Mr. Buzzard.

What was the purpose of preparing this exhibit?

In order to find out the effect of the parking tax on the parking industry.

Were you given any preconceived directions to find one type of situation or another type?

I was not.

Were you given any specific instructions as to what you should find?

A I wouldn't have taken the job if I had been.

Q Were all the records made available to you?

A Any record I ever asked for was given to me.

Q Mr. Buzzard, I think, testified he has been with you for several years. What other statistical studies have you asked him to make in other matters?

A I think I'm very fortunate to have Mr. Buzzard, a man with the capacity that he has. Immediately after he retired fr the Port Authority because of age -- and I've known Mr. Buzzard throughout many of my business years, and I immediately offered him a proposition with me, and after a short vacation he came with me.

Let me give you some of the projects I've had him on as a statistician as putting together factual data for me so we could analyze and prepare the necessary reports. He did Gillman's Service in the assembling of the data for the great high school study, the distributing of the school districts racially so that we had equal distributio between the various races, by the assigning of them to transit vehicles and busses transporting them to the respective four high schools that we were studying, the great high schools.

I was engaged to make a complete study of the complet business district of Cumberland, Maryland. Mr. Buzzard

was sent there and assembled the necessary data for me: the same in Charleroi, the same in Canonsburg, at Monroeville Plaza for the BeeGee Shopping Center. Mr. Buzzard was the statistician. Latrobe Hospital, likewise, Mr. Buzzard assembled the factual data and a recent study on Brookline Boulevard in the City of Pittsburgh for the Public Parking Authority in the City of Pittsburgh.

What was the object of putting the exhibit in this form rather than just collecting all the financial statements and serving them up to the Court?

So that it could be easily understood, everybody that wanted to know something about it had the pertinent data so they could study it.

In your opinion is it possible for the private parking operators to raise the rates and pass this tax on?

I do not believe so.

I believe you were retained by Mr. Stabile in connection with the negotiations for the Shadyside Hospital parking.

I was.

What happened there?

It became impossible to present a feasible financial report.

MR. BOEHM: I object, Your Honor. That is irrelevant, incompetent and immaterial.

THE COURT: Sustained.

(EXCEPTION NOTED)

BY MR. BOREMAN:

Q Mr. McNeil, you have supervised the production of Plaintiff Exhibit 1 and you are familiar with it, you have seen the figures. In the instances where the figures show a decline in the profit picture and in many instances a loss when the tax was increased to 15 per cent and then on the projection in 1970 when the tax was increased to 20 per cent, to what factors do you attribute that decline in profit and the existence of losses?

MR.BOEHM: I think this witness has not been qualified on that basis, Your Honor. We have had the testimony from Mr. Buzzard on this. This is pure repetition from a man who is qualified as a traffic engineer, not as an accountant, really.

MR. BOREMAN: This man has made feasibility studies.

THE COURT: We will permit him to testify.

(EXCEPTION NOTED)

THE WITNESS: In my opinion the parking tax is primarily responsible for the decline in profit in these facilities.

BY MR. BOREMAN:

Q Will you explain that?

I may say this in all fairness, I operate through authorities many garages and many parking facilities in McKeesport, in Erie, all of those places. The operation of those facilities are under my jurisdiction. I probably am a greater parking lot operator than any man in this courtroom including Mr. Stabile. Through the many parking facilities we operate, I am consulting engineer.

In your opinion can the private parking operator continue to operate with a parking tax such as the 20 per cent tax now in effect?

I think you are almost at that point or at that point now where you are going to break the camel's back.

What do you mean by that?

They are going out of business. They can't continue to operate.

Why is that?

Because you have reached that point where when you start charging 70 cents an hour for a shopper to come to downtown Pittsburgh he isn't going to come to downtown Pittsburgh when he has other facilities to go to.

How about the financial feasibility of a parking operator remaining in business with a 20 per cent tax; can he continue to do so with that tax?

I don't think he can.

MR. BOREMAN: You may cross-examine.

- - -

CROSS-EXAMINATION

BY MR. BOCHM:

Q You say you actually operate parking garages yourself?

A I operate them by setting up their budgets and by advising the operation, such as in the instance of the Public Parking Authority of Pittsburgh. If I was doing this in Pittsburgh I would be advising Mr. Wozniak on subjects of operation.

Q You said you made a comparison of parking facilities under your jurisdiction to parking facilities under the jurisdiction of Mr. Stabile?

A I said I operate many facilities in many communities. Incidentally, there is no parking tax in those communities.

Q You operate many facilities in other communities, right?

A In other communities.

Q Do you operate more facilities than Mr. Stabile operates in Pittsburgh?

A I do it in an advisory capacity for parking facilities throughout the Commonwealth.

Q Are you paid a salary by these people?

A I am paid a salary on a yearly basis.

Q If parking taxes should be imposed by those municipalities

thereby increasing their costs, it might make it uneconomical for them to retain your services?

MR. BOREMAN: I object to it, Your Honor.

MR. BOEHM: All I am driving at, Your Honor, is that the witness may have some bias here.

MR. BOREMAN: Your Honor, I think that is really a snide allegation for a professional man to testify a certain way because it might cost him his job.

THE WITNESS: I couldn't answer anyway, sir, because each community has its own problem.

THE COURT: This is all conjecture and all collateral to what is at issue.

MR. BOEHM: The bias of a witness, I think, is always of interest to the Court.

(EXCEPTION NOTED)

MR. BOEHM:

Mr. McNeil, when was it that you made your study on the number of traffic policemen that the city uses?

I obtained these records from the Department of Public Safety within the last couple months.

And from whom did you obtain those records?

From the Department of Public Safety.

Q I said whom.

A I don't know the individual.

Q You don't know the name of the man you talked to?

A That's right.

Q What particular office was it?

MR. BORDMAN: If Your Honor please, I think this is irrelevant. I object to it. These are public figures, they are obtainable as public records. I don't see where it is relevant as to where he obtained the records. If they are wrong, let him bring the records in to show they are wrong figures.

MR. DOEHM: I have no burden to do that. I am trying to find out on cross-examination what the basis of this man's testimony is on direct.

THE COURT: I think he testified as to what the basis of his testimony was on direct examination. He said he made a survey that was a list of the officers that were in the City of Pittsburgh on duty in several places and a breakdown of those figures as to how many were allocated to the corner-police job and how many were motorcycle policemen and how

many were on other duties.

MR. BOEHM: Now I am concerned with whether or not he has an accurate list, so I want to ask him from whom he obtained it, when he obtained it. This is perfectly permissible.

THE COURT: If you know, answer the question.

THE COURT: I have copies of the budget in my office, of the city's budget.

(EXCEPTION NOTED)

MR. BOEHM:

Did you get it from the budget or from somebody in the Department of Public Safety?

I got them through my capacity as consulting engineer. Every piece of information I can get, I get ahold of.

MR. BOREMAN: This is a suit against the City of Pittsburgh and we are talking about the number of policemen. This isn't private litigation. Shouldn't the City of Pittsburgh say, "Yes, these are the figures" or "No, these aren't."

What are we talking about, convincing the jury --

MR. BOEHM: I have no burden of proving

your case.

MR. BOREMAN: You have a burden of refuting the figures if that is so, and the best way to refute them is producing the city's figures.

MR. BOEHM: I certainly am not prevented from cross-examining your witness as to how he obtained his figures. If he obtained them from the budget, fine.

BY MR. BOEHM:

Q If you obtained them from the budget, I know where you got them.

A I got all the budgets in my office.

Q Did you obtain the figures you recited in answer to Mr. Boreman's question from the city budget?

A Yes.

Q And that was the city budget for what year?

A For '62, '65, '68, '69 and 1970.

Q For 1969, what were your figures on the policemen?

A There was a complement in the budget of 1500 police offic

Q The budget recited that there were 1500 police officers?

A That's right.

Q What did the budget say about those engaged in directing traffic?

It did not say that.

Did you give us a figure on the number of policemen that were engaged in directing traffic?

Yes.

Did you get that from the budget?

No, I got that from the Department of Public Safety.

THE COURT: The witness has answered he got it back --

MR. BOEHM: He changed it to the budget and --

THE WITNESS: There's two figures, the first figure is from the budget.

MR. BOEHM:

Now, I want to know what office you got it from in the Public Safety Department.

From the Department of Public Safety.

You were employed in the Department of Public Safety, right?

That's right.

And you were employed in the Bureau of Traffic Planning, weren't you?

Yes, sir.

You know there are other bureaus in the Department of Public Safety?

Yes, sir.

MR. BOREMAN: I object on the ground it is irrelevant and arguing with the witness.

MR. BOEHM: I am permitted to on cross-examination. That is my function.

MR. BOREMAN: Not arguing.

THE COURT: From what department in the Public Safety Building did you receive the information that you have testified about?

THE WITNESS: I got them from the Depart of Public Safety.

BY MR. BOEHM:

Q Sir, you know that there are several bureaus.

A Are you wanting to know the individual's name that gave the figure?

Q I asked you that before and you said you didn't know.

A In the Traffic Division as you well know they vary from number to number in who gives the figure and so forth and so on. One day he's assigned to East Liberty -- you can get that figure, it can vary around the clock.

Q Let us approach it a different way.

Did you go into the Public Safety Building and go to a particular office and ask for this information, did someone hand you this information on a sheet --

A No.

of typewritten paper?

Was it typed out for you, how did you obtain it?

I called up and got the information.

You got the information on the telephone?

MR. PARKS: Might I suggest that we shorten this. Just leave a space in the record and the city can submit the figures it derives from the traffic department. This is a public matter and it is not disputed. We have spent about 15 minutes on it.

THE COURT: The longer you want to drag this out, it is up to you.

MR. BOEHM: We have an important matter at hand here. This is one of the ways of my determining and your determining the validity of the information given by this expert witness. I want to find out what the sources of his information are. If we can't find that out --

THE COURT: We are satisfied with the information that we have received. Now, true, you have every right to a cross-examination and it is your duty. We would think less of you if you didn't move in on him to protect your client

MR. BOEHM: I want to find out where --

THE COURT: But we just don't want you to abuse that privilege. We think you have explored this phase of your cross-examination sufficiently that the Court understands the situation, and we would suggest that you adopt another tactic if you have further cross-examination.

MR. BOEHM: Is the Court really ordering me now and refusing me further cross-examination on this witness with respect to the source of his information on the number of traffic policemen employed in the City of Pittsburgh?

THE COURT: No, we are not ordering you at all. We are merely suggesting. You continue beating a dead horse. Do you want me to write it out for you?

MR. BOEHM: I have tried to be polite in the conduct of the case, Your Honor, and I hope that my conduct hasn't been upsetting to you. I am sorry if it has.

THE COURT: You see, when it is hot and time is of the essence and we drag out a case, not because you haven't a right to do that, but when we get into a lot of collateral issues

that are not directly concerned with the main stream it becomes very frustrating to the Court.

MR. BOEHM: Your Honor, I agree. I don't think that this is relevant, either, and I made objections when this witness took the stand, but now that the Court has permitted his testimony I feel that I have to honestly find out where he got the conclusions or how he arrived at the conclusions that he has given to the Court. If I don't do that I think I am not doing my duty.

THE COURT: Proceed.

(EXCEPTION NOTED)

MR. BOEHM:

Sir, tell me this, did you get these numbers -- you got them over the telephone, you say, is that right?

Yes, sir.

And this was about two months ago?

I'd say about two weeks ago.

And when you got that information you called somebody in the Department of Public Safety?

That's right.

And you can't be any more detailed than that?

I know the records, in my opinion -- if I had to swear to

them, they are correct.

Q You can't give me any more detail on that as to your source of information?

A I promised not to. Look, this is the City of Pittsburgh and I don't want anybody disciplined because they furnish public information.

Q Sir, I am not suggesting that. I hope you understand.

A I had to make that promise on that basis to get the information that I would not divulge my source.

Q I am certainly sorry if you did because that is certainly not the policy of the city. I think the records, as the Court knows, --

THE COURT: We will take a short recess at this time.

(Recess taken.)

BY MR. BOEHM:

Q Mr. McNeil, of those 115 traffic policemen you testified to that were used in 1969 -- is that right, or was it 1970?

A In 1969 it was 156 and in 1970 it was 116. Which was it you used?

Q I am interested in both of them, actually. It was 116 in 1969?

A It was 156 in 1969 and 116 in 1970. This is the complement of the Traffic Division.

Did you take into consideration or do you know what the cost of those policemen are to the City of Pittsburgh?

I don't have the budget with me here, but it is all in the budget.

You don't know what it is, right?

Not at this moment.

In connection with the survey you made for the Plaintiffs in this case, did you calculate the number of persons that come into the Golden Triangle every day?

Well, we qualified that. When you say the number of persons that come into the Triangle -- when you come into the Triangle on the Penn Lincoln Parkway and whether the person is stopped or not -- what is your question?

The question is, did you calculate as part of your survey for the Plaintiffs in this case the number of people who actually come into the Golden Triangle of the city. By the Golden Triangle I don't mean the people who might pass by the Triangle on the Parkway. The people who actually enter the Golden Triangle.

There is no way to get that figure, sir.

Did you take into consideration or calculate the number of people who come into the Golden Triangle every day by automobile?

MR. BOREMAN: If the Court please, that is

objected to. He was not commissioned to make a traffic survey and he has not prepared himself for that.

MR. BOEHM: All he has to do is say no.

THE WITNESS: No.

BY MR. BOEHM:

Q Mr. McNeil, in connection with your survey did you calculate the percentage or the number of people that use mass transit to come into the city as distinguished from the automobile?

A Not for this I didn't.

Q Do you know the number of people who come here to shop as distinguished from the number of people who come here to work and use their automobiles?

A Not as of 1970 I do not.

Q Did you use those figures in arriving at the conclusions that you gave the Court in answer to Mr. Boreman's question?

A No, I did not.

Q Do you know what the average stay of the person who drives his car into downtown for shopping purposes is?

A In a general sense. Between two and three hours.

Q Was that one of the things that you took into consideration in connection with this survey that you made?

A The survey that I made here was factual data of the gross incomes and the operating costs of the various facilities

that are managed or operated by the Plaintiffs.

In other words, your testimony is wholly confined to the financial condition of the operators of these various lots, is that right?

No, it is not. The report dealt with that but not my testimony.

You don't know, do you, Mr. McNeil, how much it costs the city by way of salaries to policemen, meter maids, traffic people who are charged with towing and impounding automobiles to service the traffic problem in the City of Pittsburgh —

No, sir.

— downtown area?

No, sir.

You did read the study done by Wilbur Smith?

I read a paragraph out of it, Paragraph No. 2 of his letter of introduction.

Are you familiar, sir, with the entire survey of the parking study?

I have read it in general, in a general sense. I can't tell you every detail of it.

Do you agree with it?

Yes, I do.

You agree with the conclusions reached by Mr. Smith?

Yes.

MR. BOREMAN: That is objected to, Your Honor. What conclusions is he referring to?

MR. BOEHM: I am referring to them all. I didn't limit them.

MR. BOREMAN: Are you asking if he agrees with every conclusion in that book?

THE WITNESS: I thought you meant in a general sense. I'd have to go over the entire report piece by piece.

BY MR. BOEHM:

Q Is there any major item that you noticed when you read the report that you would disagree with?

MR. BOREMAN: I object to that, Your Honor unless he asks him what conclusion he is talking about. That is a vague question.

THE COURT: We will sustain the objection.

(EXCEPTION NOTED)

MR. BOEHM: I hate to take up the Court's time, Your Honor, and go through these conclusions one by one and ask him if he agrees or disagrees. I am limiting it to only the major one, as the Court suggested. My question was, is there any major item in this report with which he disagrees. I can't really see what is objectionable about

that.

MR. BOREMAN: If Your Honor please, I object to the question. Mr. McNeil did not prepare this report. He was not called as an expert witness based on whether he agrees or does not agree with that report. To ask him that question is incompetent, immaterial and irrelevant unless he specifies what conclusions he is talking about. That is not his report, that is Mr. Smith's.

MR. BOEHM: Mr. McNeil is an acknowledged expert, Your Honor. He read from the report, he is familiar with it. He read it, and I think in the area of his expertise it is perfectly permissible to ask him if he agrees with its major conclusions.

THE COURT: Do you or don't you agree with the major conclusions?

THE WITNESS: In general I do, sir.

THE COURT: The answer is in general he does, yes.

MR. BOEHM:

So that you agree, Mr. McNeil, that at the present time the city is in need of -- did you say 26,000 parking spaces?

A Yes, sir.

Q You don't mean 26,000 additional?

A I do not, I mean total.

Q You mean total 26,000?

A Yes.

Q At the present time how many parking spaces do we have available in the downtown area?

A Around 23,500 and another 700 on the street.

Q So that you would say at the present time in your opinion there are 2,000 additional parking spaces needed in the Golden Triangle area of the city?

A I'd like to qualify the word "need" if I may, Your Honor. What is needed and what you can support many times aren't the same thing. Yes, we need 2,000 more parking spaces downtown. I don't say necessarily you can support them.

Q Did you get those figures from Mr. Smith's survey?

A I have Mr. Smith's survey.

Q I say, did you get those figures that we have been referring to --

MR. MARKS: The questions are a little bit misleading. I don't mean deliberately so. The survey talks about 100 spaces and Mr. Bo has adjusted the figures to come out to 2100 and asks the witness, "Do you agree with

Mr. Smith's study" and the figure became 2100.

MR. BOEHM: I never thought of that, but it might be a good idea. I am not doing that at all.

M. BOEHM:

I wanted to know if the basis for your figures on need were obtained from Mr. Smith's survey or if you conducted an independent survey of your own to come to that conclusion.

I did not conduct an independent survey of my own.

Did you come to that conclusion on the basis of Mr. Smith's survey?

Mr. Smith is a very qualified engineer and does work similar to what I think I do, and I would not challenge him.

Is that where you got your ideas on it?

Yes, I did, because it's well documented. It's there and it's ready information.

Isn't it true that Mr. Smith's survey takes into consideration the present economic condition of the city today with respect to -- not economic condition, that is too broad -- with respect to the economics of parking charges?

Not necessarily. I did not gather that fact.

Is it your opinion that we need a couple of thousand, or so, extra parking spaces, there is a demand for this? I think you used the word "demand."

A That's right.

Q But there is not a demand for it at present prices?

A I don't think you can support 2,000 more spaces today at what it would cost.

Q At the current price being charged for parking today do you think that the city can support any additional parki spaces?

A Now, wait, give me a cost of these parking spaces. You just talk in general. If you talk on fringe parking, if you talk about parking across the river on the North Sid if you talk up on the Hill, if you talk within the inter part of the Triangle I have to give you a different ans

Q The Golden Triangle.

A You had better be on the fringes if you are going to sup them out where property values aren't high.

Q Today at present prices there is not a demand for addi-tional parking in the core area?

A I don't think you can support it at the cost you would h to pay today.

Q When I said demand, I mean support, in an economic sense, considering laws of supply and demand.

MR. BOREMAN: Ask the questions, if Your Honor please. Is there a demand and can it b supported are two different things. Which d

you mean?

MR. BOEHM: I told him what I meant.

THE COURT: I think the witness has answered the question. We understand that.

MR. BOEHM:

In the core area is there a demand in the economic sense, you know what I mean, don't you, the law of supply and demand?

You will never support them in there today. There is a need, you can't support them.

In the economic sense of a demand there is no demand for additional parking facilities in the core area of the Golden Triangle, the people are not demanding more space to park because nobody will pay the price?

If you put 2,000 spaces in and made them very low cost they'd be used, but if you have to charge what it actually costs to develop it they will not be used.

Let us assume that the price is the price that is currently being charged in the area of the Golden Triangle.

MR. BOREMAN: He has answered this about --

THE COURT: Objection sustained.

(EXCEPTION NOTED)

MR. BOEHM:

At the present time you say, Mr. McNeil, there are 24,000, or

so, parking spaces in the area of the Golden Triangle, is that right?

A Including the street, yes.

Q There are 700 on the streets and the remainder in parking garages, right?

A That's correct.

Q And at rush hour in the early morning hours when people are coming to work and in the evening when people are leaving work we have our greatest congestion on the streets, is that right?

A Those are our heaviest periods for traffic movement, yes.

Q What percentage would you say of those automobiles that are on the streets at that time in the morning were going to a parking lot in the Golden Triangle or in the evening had left a parking lot in the Golden Triangle?

A I'd say about 40 per cent.

Q Forty per cent?

A Um-hum.

Q Where would you say the remaining 60 were going?

A The other somewhere near 15 to 20 per cent would be coming in to discharge or pick up people and the other would be what we call through traffic, people who were going from North Side to South Side or people coming from West End going up on the Hill.

you mean?

MR. BOEHM: I told him what I meant.

THE COURT: I think the witness has answered the question. We understand that.

MR. BOEHM:

In the core area is there a demand in the economic sense, you know what I mean, don't you, the law of supply and demand?

You will never support them in there today. There is a need, you can't support them.

In the economic sense of a demand there is no demand for additional parking facilities in the core area of the Golden Triangle, the people are not demanding more space to park because nobody will pay the price?

If you put 2,000 spaces in and made them very low cost they'd be used, but if you have to charge what it actually costs to develop it they will not be used.

Let us assume that the price is the price that is currently being charged in the area of the Golden Triangle.

MR. BOREMAN: He has answered this about --

THE COURT: Objection sustained.

(EXCEPTION NOTED)

MR. BOEHM:

At the present time you say, Mr. McNeil, there are 24,000, or

so, parking spaces in the area of the Golden Triangle, is that right?

A Including the street, yes.

Q There are 700 on the streets and the remainder in parking garages, right?

A That's correct.

Q And at rush hour in the early morning hours when people are coming to work and in the evening when people are leaving work we have our greatest congestion on the streets, is that right?

A Those are our heaviest periods for traffic movement, yes.

Q What percentage would you say of those automobiles that are on the streets at that time in the morning were going to a parking lot in the Golden Triangle or in the evening had left a parking lot in the Golden Triangle?

A I'd say about 40 per cent.

Q Forty per cent?

A Um-hum.

Q Where would you say the remaining 60 were going?

A The other somewhere near 15 to 20 per cent would be coming in to discharge or pick up people and the other would be what we call through traffic, people who were going from North Side to South Side or people coming from West End going up on the Hill.

Is it your opinion that those twenty-three or twenty-four thousand spaces that we now have are almost all being used every day, or what percentage of them would you say are being used?

A goodly percentage, better than 90 per cent are being used.

And certainly, then, 90 per cent of 24,000, if we calculated that, we could say that number of automobiles were using parking spaces downtown?

If they came and departed at that particular period, yes.

You said the department stores and the hotels are the things that really draw the traffic congestion, or I think they were the ones you used.

I said they were one of the principal generators.

They were the generators.

And would you consider the parking spaces that we have available here, those 24,000 parking spaces, as a primary generator of this traffic?

The parking spaces don't generate traffic, it's the buildings, the stores, the hotels, the department stores that generate the traffic.

Are you of the opinion that if we had the department stores and the hotels here and didn't have those 24,000 parking spaces we would still have the same number of automobiles?

You would have one of two things; you would either have

people avoid the Triangle because of no place to stop or you'd have the streets so seriously congested that nobody would come near the Triangle.

Q Isn't there another alternative?

A I suppose you are going to say the use of mass transit vehicles. I think we're a good piece off from that.

Q That obviously is the other alternative.

There is more than one way to get downtown. You don't have to use automobiles to get downtown.

A You can walk downtown if you want to, if you want to get up early enough.

Q I imagine a lot of people do.

A When I was here approximately 15,000 people walked into the Triangle daily.

Q You would agree, though, that if the 26,000 or 24,000 spaces were not here we wouldn't have the number of automobiles that we do have on the streets today?

A I don't think you could have them.

Q You couldn't have them, right, there wouldn't be any pla to park them when the people came here?

A That's right.

Q When the Parking Authority was first created by legislat in 1945, I think you said you participated somewhat in seeing that law pass?

Yes, sir.

It is true, isn't it, that since that time parking rates have constantly increased?

Yes, sir.

And since that time I suppose the number of parking spaces available has also increased?

Well, we have approximately 11,000 more spaces today than we had at the time of my original study.

So there was an additional number of spaces made available for people to use?

Yes, sir.

And the price kept getting higher and there is still a need for more parking spaces, would you agree with that?

That's what I testified. Now, remember, I qualified that need with what I told you before when you could economically support that need.

And in your opinion we couldn't charge any higher price than we now have and employ additional parking facilities in the downtown area?

That's right.

Just let me ask you how you came to that conclusion. With construction costs today, operating costs, today, costs to borrow money today, the general overall cost of everything, you couldn't possibly.

Q It is not because of the fact that the city has increased the parking tax from 15 to 20 per cent?

A The parking tax is 20 per cent on top taken off of that. As a matter of fact, the 20 per cent tax is actually a 25 per cent top cost that you have placed on top of the parking industry. You will destroy the industry with this parking tax.

MR. BOREMAN: If the Court please, he has asked him the question about whether there is demand in the economic sense of the public being able to support higher parking rates for these 2,000 spaces and he is answering why.

THE COURT: He has answered the question. He is entitled to explain it. That is what he has done.

MR. BOEHM: I think he has answered the question.

THE COURT: I am glad you agree.

BY MR. BOEHM:

Q Have you been in contact with the Bureau of Traffic Planning in recent months with respect to studies that are currently being undertaken with respect to traffic congestion in the downtown area?

A No, sir. I've talked to certain of the staff but not with

reference to that specific subject.

You are not aware of any study that has been undertaken with respect to eliminating backups and congestion at parking facilities?

That's the function of the Bureau of Traffic Planning, they should always be doing that, and that's its function, its purpose.

MR. BOREMAN: If the Court please, may I ask that the last question of counsel be stricken from the record unless he is prepared to state that he will back it up with testimony as to studies being made by the Bureau of Traffic Planning relative to traffic backing up or congregating or causing congestion in a parking garage. There is nothing in this record -- unless counsel is prepared to say that there are such studies in progress, I ask that the question be stricken.

THE COURT: Did you hear his objection?

MR. BOEHM: Yes, Your Honor.

THE COURT: Are you prepared to state whether or not there are backup studies with regard to traffic congestion as a result of these --

MR. BOEHM: Yes, Your Honor.

MR. BOREMAN: May I ask Your Honor whether he is prepared to produce testimony in regard to those studies so I will have an opportunity to cross-examine them.

MR. BOEHM: I am prepared. I could if I wanted to.

MR. BOREMAN: I ask the question be stricken until such time as he does or says that he is going to.

MR. BOEHM: I am just asking him if he is aware of it to see in what area he is an expert, what studies he has really made to come to the conclusions that he has come to.

THE COURT: We will leave the testimony in the record with the assumption that you are going to back up what counsel for the Plaintiff has suggested, otherwise that testimony will be stricken. You may use your own judgment as to whether or not you want the testimony stricken.

(EXCEPTION NOTED)

BY MR. BOEHM:

Q Would it be your opinion, Mr. McNeil, that if we restricted or forbad the use of the automobile in the Golden Triangle

these department stores and hotels would be able to continue in business?

MR. BOREMAN: That is objected to, Your Honor, as a hypothetical question that has no foundation in reality. Everybody knows that is not going to be or can't be.

THE COURT: I didn't quite follow that question. Would you repeat the question, please?

MR. BOEHM: If we selected an area and forbad the automobile to enter it, banned the automobile and therefore eliminated the need for parking, would these businesses that he says generate the traffic congestion be able to continue?

MR. BOREMAN: He is not prepared to answer that, Your Honor.

THE COURT: That is too far a matter of conjecture, Counselor. That is too far out, that is too much a matter of conjecture to ask for opinion evidence in a situation of that sort, particularly relative to the case at issue. I don't think that is a proper question.

(EXCEPTION NOTED)

MR. BOEHM: That is all I have, Judge.

MR. BOREMAN: I just have a couple questions, then we will finish.

- - -

REDIRECT EXAMINATION

BY MR. BOREMAN:

Q Mr. McNeil, you were asked as to the number of people who come into the Golden Triangle and the number that come in by mass transit and the number that come in by automobile when they come in to shop or work.

Regardless of whether they walk or ride or come in to shop and work, isn't it true part of them will walk, part of them will use mass transit, part of them will use parking garages?

MR. BOEHM: I object, Your Honor. He is leading his own witness.

BY MR. BOREMAN:

Q Regardless of the number of people who come in to the downtown area and whether they walk or ride, will the existence of parking garages contribute to congestion caused by those people coming in?

A No.

Q Just to make the record clear, I have two final questions pardon me, one question.

In cities that now have mass transit systems, good mass transit systems, is there still a need for parking garages?

Yes, sir.

Mr. McNeil, as an expert in this field and in your opinion is there any basis or rationale to support the conclusion that parking garages cause congestion and require additional municipal services so as to justify a tax?

No, sir.

In your opinion, will a parking tax, whether it be of ten, fifteen or twenty per cent, destroy the parking industry?

Yes, sir.

MR. BOREMAN: I have no further questions.

MR. BOEHM: Now, I am going to move to strike the last question and answer unless there is a proper foundation laid, unless this witness tells us what the basis for his conclusion is with respect to the parking industry and further for the reason that it is not relevant here because the question is not whether the parking industry will be at some time in the future destroyed but the question is whether or not the parking industry is or has been destroyed as a result of the parking

tax.

BY MR. BOREMAN:

Q Give your reasons, Mr. McNeil.

A Exhibit 1 shows you are well on your way to destroying it with the taxes.

MR. BOEHM: The record shows that the only basis for the witness's last answer is Exhibit

BY MR. BOREMAN:

Q Does the witness care to add to that?

A In the first place, I think this exhibit very dramatically shows it. I've told you that you have already -- you can't think of raising prices, in my opinion, in downtown Pittsburgh. You can't think of it. You have already destroyed the industry with the 15 and the 20 per cent tax as indicated here. Even the 10 per cent has gone way out, if you study Exhibit 1.

Q With respect to the possibility of acquiring financing to build new garages or new structures, what is the effect of the tax?

A I think it's going to be a long time before you finance more garages in the core of the business area.

Q Why?

A Because of the cost of financing them, because of the tax that is on top of all of it and because of the cost of

operation and the cost of construction. But the overall, before anything else comes out of this, you have the tax on top, you have that to boot. You are destroying the industry.

MR. BOEHM: Are you finished?

MR. BOREMAN: I am finished.

- - -

RECROSS-EXAMINATION

BY MR. BOEHM:

Mr. McNeil, what is the average daytime all-day parking rate in the Golden Triangle area of the City of Pittsburgh?

MR. BOREMAN: You mean of the Parking Authority or private operators?

Your Honor, there is a big difference.

MR. BOEHM: Private operators, Your Honor.

BY MR. BOEHM:

I don't have to have an exact figure. Roughly.

MR. BOREMAN: If Your Honor please, that is already in evidence as an exhibit. I think it is an exhibit -- I can find it.

MR. BOEHM: Let the witness answer the question.

MR. BOREMAN: We will save some time.

MR. BOEHM: Go ahead, show it to him if it

is there.

THE WITNESS: The average parking rates eight downtown Parking Authority garages for nine hours that was effective on February 1, 1970, was $2.56 and in the privately owned parking garages for nine hours was $2.37.

BY MR. BOEHM:

Q In the private lots the average is $2.37?

A Yes, sir, for nine hours.

Q Now, for the Parking Authority lots it was $2.76 average, right?

A For the Authority lots, eight lots, it was $2.56.

Q It was $2.56?

A Yes.

MR. BOREMAN: How much for the private l again?

THE WITNESS: $2.37 for the nine-hour r That is the average for the eight facilities.

BY MR. BOEHM:

Q Aren't the Authority lots pretty well used, Mr. McNeil?

A The Authority lots are geared to primarily -- are geared to favor the short-time parker.

Q We are talking about the nine-hour rate.

A The nine-hour rate is approximately 19 cents less in the

private operator lots than in the Authority. But the one-hour rate in the private-operators' lots is almost double what it is in the Authority lots. And the two-hour rate in the privately owned garages is 96 cents as compared to the Authority garages of 55 cents, and the three hour rate in the privately owned lots is $1.18 as compared to 80 cents.

Are the Parking Authority lots operating at close to maximum use of their lots? Are the people parking in the Parking Authority lots in spite of the fact that their average rate is $2.56?

They are operating almost to capacity, yes.

And the private lot averages $2.37 and they are operating at almost capacity, also?

I don't know that they are all operating at capacity, but those properly located lots are being well occupied and those garages.

Can you explain to me why you take the position that a private lot cannot increase its price over and above that $2.37 and still operate at close to capacity?

I believe that $2.37 is pretty expensive to come to work in downtown Pittsburgh.

But the people are paying it.

Some people are paying it.

But the lots are operating at close to capacity.

A In some instances, yes. You heard Mr. Smith tell you he has 400 vacancies up at Chatham Center.

Q Can you explain to me why with the $2.37 rate that we have now, average for the private lot, and with the 20 per cent parking tax that we now have and considering the fact that the private lots are operating at near capacity that this increase of five per cent is destroying the parking indus

A I didn't say the increase of five per cent. I think the fifteen per cent and the ten per cent were starting to destroy the industry.

Q I mean the increase of five to make it twenty.

A I made the statement that that was the straw that broke the camel's back. You have already crippled it, but you are destroying it, in my opinion.

Q Are you taking the position that a five per cent or a seven per cent parking tax destroys the industry?

A It's like a boat in water, you can only put so many pebbles in. When you put that next piece of gravel in, down goes the boat.

Q It is similar to any business, isn't it, if the cost of business increased, whether it be in the way of taxes or operating expenses, that boat continues to go a little lower in the water, it doesn't make any difference what business you are in. The question is, how much can you

in that boat and still have it continue to float.

Yes, sir.

With respect to the private lots, it put $2.37 in that boat and it is floating, it is doing well, it is loaded with passengers.

It's not doing well. If you take Exhibit 1, it's sick, it's sick and it's going out of business.

But they are operating at close to capacity.

MR. BOREMAN: He didn't say that, Your Honor.

You asked him about the Public Parking Authority garages.

THE WITNESS: I said some key located lots is what I told you.

R. BOEHM:

I don't remember that phrase, but you say it is only the key located lots --

MR. BOREMAN: He has said it four times. If Your Honor please, may I ask counsel to say, is he referring to Public Authority lots or private lots or both, and is he referring to the question of long-time parking, is that operated to capacity in respect to Public Authority lots and private authority lots?

MR. BOEHM: I think it is perfectly clear,

Your Honor. I am saying private lots, $2.37; Parking Authority lots, $2.56. I am talking about the privately operated lot right now.

MR. BOREMAN: Let him answer.

MR. BOEHM: I am sure he has forgotten the question now.

THE COURT: I think we have all forgotten the question.

MR. BOEHM: Let me try it again.

MR. BOREMAN: I would like to know where gets his rates.

MR. BOEHM: I am getting my figures from what Mr. McNeil gave me. Mr. McNeil has told me the average price for the private lot, and I think he said nine hours is $2.37 and the average price of the Parking Authority lot for an all-day parker, nine hours, is $2.56.

BY MR. BOEHM:

Q Is that right, Mr. McNeil?

A That's right.

Let me qualify this. Let me straighten this up. The rates became effective February 1, 1970 in the Parking Authority garages. They were just changed and the figures that I quoted to you were those that were just changed.

Wilbur Smith's report shows just the reverse.

What does he show?

Random?

What do you mean by just the reverse?

Wilbur Smith's report --

I don't really have to have Wilbur Smith's report.

It depends for the moment when you ask for what the rates were. I told you what the rates were for today.

What I can't understand -- let me put the question again.

When you load this boat that you are talking about with $2.37 and the other operating expenses and taxes and it still continues to float, and now you say that the key locations are operating at near capacity, the other locations aren't, I don't know what you said.

Fairly well used.

Parking is still a problem, finding a parking space is a problem today, whether you want to find it in an Authority lot or a private lot.

That's right.

The Authority has loaded its boat with $2.56 and it is still tough to find a space there. I can't understand why you are saying that you can't increase that $2.37 price any more or that boat will sink.

Now, the $2.37 are what the Parking Authority is charging

as of February 1, 1970. This is the average nine-hour rate in the Public Parking Authority garages as of February 1, 1970.

Q I understand that.

Would you say, for example, that if the private lots raised their price from $2.37 for the average price for the nine-hour stay, from $2.37 to, say, five per cent in excess of that, whatever that figure would be, they would lose their customers?

A If they raised from $2.37 would they lose their customers is your question?

Q What is five per cent of $2.37?

A Of course, you are assuming that the entire garage is filled with nine-hour parkers. That is what you are assuming under that question.

Q If they raised it eleven cents, which would be five per cent of $2.37, maybe twelve, twelve cents, instead of charging $2.37 they charged, maybe, $2.50, would that be the straw that broke the camel's back?

A If all the cars in this garage were all-day parkers and you collected $2.50, they wouldn't make near the money they are making today by catering to short-time and long-time parkers.

Q That is not my question, sir.

last question was if I raised the nine hours five per cent would I break the camel's back. Yes, if every car in the unit was nine-hour parking, yes, you will, and it's a dead unit then.

You know that is a hypothetical which doesn't exist.

MR. BOREMAN: I object, Your Honor.

THE COURT: We will sustain your objection. Let us not get in an argument with the witness.

MR. BOEHM: He is answering my question by use of a hypothetical, Your Honor, which has no basis.

THE COURT: The way the question is put, there is no other way to answer it; and secondly, you are getting argumentative here, Counselor.

MR. BOEHM: I am sorry, Judge. Can I ask the question again?

THE COURT: We sustained the objection. You see, what you consider in presenting your position is based on the figures as they were prior to the present-day situation, what they are today and the effect, not conjecture. If they do this, or perhaps they may do that, it is a question as to what they have done and

what the situation is now.

MR. BOEHM: I think that is right, Judge, but the witness has testified over my objection that the situation is at its breaking point and we can't raise those prices any further, and he said, "Yes, we are using those spaces at near capacity but if you raise those prices any more there won't be a need for an additional 2,000 parking spaces," and that is what I am asking about.

THE COURT: The witness has just answered that. You see, the whole point is this, as I understand what they are trying to get across here, that by the city continuing to raise the tax or raise it as it has done, it is putting the parking lot people out of business, it has raised this to a point where they cannot economically and reasonably attract customers to use their parking spaces. It is as simple as that.

MR. BOEHM: That is right, Your H

THE COURT: And it has now become confiscatory, in their estimation, and it is going to put it out of business. It is like these continuous strikes. Every time there is a contract that comes up and they have a strike, they raise the ante, they get a raise in wages. What is the result that is passed on; we have inflation. The industry, as such, is put out of business because it can no longer compete because of the high costs that are required for its operation; and it is the same thing whether it is by strikes or whether it is by taxes, or what source. It is the same thing. When you reach the saturation point you are no longer competitive.

MR. BOEHM: That was my question, Your Honor, with respect to the saturation point.

THE COURT: The witness has answered that. I am satisfied.

MR. BOEHM: I am not.

THE COURT: Do you have another

question?

MR. BOEHM: I would still like to know how he arrives at the conclusion that if that price is raised from $2.37, which is presently being charged, to $2.50 why it would be that raise which broke the camel's back.

MR. BOREMAN: If the Court please, I object. He has answered the question.

MR. BOEHM: Is the Court sustaining that objection?

THE COURT: As I told you before, we will permit the witness to answer it again. We are satisfied that he has already answered it.

Now, Mr. McNeil, can you answer the gentleman?

THE WITNESS: Counsel is assuming that the raising of that nine-hour rate -- that one rate by five per cent is not going -- will not cause the breakdown. The nine-hour factor is not the whole thing. In other words, there's a lot of people out

hour, a lot of people two hours, a lot of people three hours. Good management of a garage is not to have 25 per cent of your cars all-day parkers. The day you make a garage operate for all-day parkers for this meager rate of $2.56 you are in trouble. You must cater to the short-time parker to have a successful financial program. Raising that to $3.00 isn't going to help this because they have to live on the turnover.

M. BOEHM:

If you raised the short-term parkers' rate, would you have it?

I've answered that question. I've told you that the 72 cents an hour is already prohibitive and is ruining the industry and stopping people from coming downtown to shop, in my opinion.

Are you saying that the number of people who park downtown short term has been drastically reduced?

In my opinion, yes.

As part of your survey did you calculate the number of ple that come downtown to park short time?

A The study I have made, this particular Exhibit 1, does not show that information. This is other information that was gathered throughout the years that I have reached that conclusion.

Q When did you come to this conclusion that you are giving today?

MR. BOREMAN: Which conclusion, Your Honor?

MR. BOEHM: The conclusion that the short-term parker -- the number of short-term parkers has been drastically reduced.

BY MR. BOEHM:

Q You didn't do it for Mr. Boreman in connection with this survey. Did you make other studies?

A I live in Pittsburgh, I speak with many Pittsburghers, I have many women tell me -- I am constantly being informed of that information by people who live in the area. I have two newspaper clippings --

Q I don't think we want to see those.

A -- that are worth listening to.

Q They are not admissible in evidence. I would object to your doing it.

MR. BOREMAN: You asked him how he knows it and he is going to tell you what his source of information is.

THE COURT: He has suggested that he has these various things. Now we have the answer.

MR. BOEHM: You are right, we have the answer.

MR. BOREMAN: In other words, Mr. --

MR. BOEHM: Wait a minute. I am not finished.

M. BOEHM:

In making your study for the Plaintiffs in this case, Mr. McNeil, did you take into consideration parking facilities in downtown Pittsburgh that were owned by other people, people other than the Plaintiffs in this case?

MR. BOREMAN: If the Court please, that is objected to as being irrelevant. He was commissioned to make the study of the Plaintiffs' financial picture and nothing else. That is the extent of his

study, and he is asked as to financial conditions of the Plaintiffs only based on that study. He was not asked to make any study of people other than the Plaintiffs.

THE COURT: He can answer that.

(EXCEPTION NOTED)

BY MR. BOEHM:

Q That is it, then, and that follows, Mr. McNeil, that the conclusions you have arrived at in court in answer to Mr. Boreman's questions and the conclusions you have given the Court on cross-examination from me are applicable only to the parties who are Plaintiffs in this case?

MR. BOREMAN: That is objected to. He testified while he made a study of the Plaintiffs he has over 40 years of experience as a parking consultant, traffic consultant; and his testimony as an expert witness is not limited to parking facilities of the Plaintiffs only. The financial picture that he testified to is, but the conditions of parking in Pittsburgh is not and I think the question is unfair.

MR. BOEHM: Does the Court want to rule on that one?

THE COURT: I think the way that counsel has put it that the report here upon which Mr. McNeil was commissioned to make for and on behalf of the Plaintiffs is relative to the financial aspect of this thing. As to the other information that the witness testified to with respect to the traffic and the traffic lines, the traffic congestion and all those other items that you brought out in direct examination, was testified to on the basis of his past experience. He has been qualified as an expert in this field and particularly in the field in which he was testifying to and about.

MR. BOEHM: That was my understanding, Judge.

THE COURT: Very well, so that the question is answered.

MR. BOEHM: Except I want it made clear that the conclusion that he came to

concerning the financial condition of parking lots in the City of Pittsburgh is applicable only to those parking facilities which are listed in Exhibit 1.

THE COURT: That is not the conclusion that he came to, if I understand his testimony.

MR. BOEHM: Can I ask him, Judge?

THE COURT: His conclusion, as I understand his testimony, was that if the city continues to raise the ante on their taxes that parking facilities will be out of business period.

THE WITNESS: That is correct.

THE COURT: It wasn't limited to the losses that these Plaintiffs have sustained by virtue of their testimony.

MR. BOEHM: Can I ask him?

THE COURT: Is that correct?

THE WITNESS: That is correct. Except one thing, I said not only where they are today but they have hurt [illegible] the past, even the 15 and the 10 per

Mr. McNeil, let me ask you if you did your survey, and your survey is Exhibit 1, and you have before you only the financial condition of those parking lot operators, how can you testify that other parking lot operators are being driven out of business and at the same time admit that you didn't take their particular financial situation into consideration?

MR. BOREMAN: If the Court please -- I will withdraw the objection. Answer the question.

THE WITNESS: In my field we are constantly seeking any information that we can receive whether they are these garages or any garages, we are constantly trying to get additional information, and from time to time we get additional information. You heard Mr. Stabile bring up the Shadyside Hospital.

BOREM:

That was objected to, and the Judge ruled that should not be part of the evidence.

MR. BOREMAN: That is not correct.

MR. MARKS: Mr. Stabile's testimony came in without objection.

THE COURT: Let us not get into this past history. The witness is trying to explain to you how he has arrived at these conclusions. Now, let us cut out this horse play and devious cross-examination and get down to the merits here.

I say to you, Counsel, and I have suggested to you before that you have every right to your cross-examination and can certainly make it on a broad scope and we propose to grant you that privilege. But don't abuse it. We think up to this time we have extended you every courtesy and we think that further cross-examination of this witness along the lines that you have been following is repetitious and unwarranted in the circumstances for the reason that the witness has answered the question a half

a dozen times in a half a dozen different ways.

Now, let us proceed, if you have anything further.

MR. BOEHM: May I say something to Your Honor.

THE COURT: You may.

MR. BOEHM: The reason for the question is that in my opinion of the law Plaintiffs have the burden of proving that the parking industry as a class, not specific operators, are having their business confiscated by this parking tax so that I thought it was important for the record to reveal whether Mr. McNeil has made a study with respect to only certain operators or whether he has made a financial study with respect to the parking operators as a class or as a whole, and I asked him that question, Your Honor, and he started to tell me that he has other sources of information and started to explain what they were when we

were interrupted. All I really wanted him to do was to ask him to finish answering that question and I will be satisfied.

THE COURT: Do you remember what the question was, Mr. McNeil? Maybe we can finish it.

Can you rephrase your question?

THE WITNESS: I started to talk about Shadyside Hospital, and then he stopped me.

THE COURT: That is right.

BY MR. BOEHM:

Q Mr. McNeil, what other sources of information in addition to Exhibit 1 which you have prepared are you relying on to come to the conclusion that parking lot operators other than those who are Plaintiffs in this case are being put out of business by reason of this parking tax?

A I don't have sufficient information to answer your question. Let me say in the consultant field as consultants, every source of information, every operation you can get ahold of, every publication -- Why do I have Wilbur Smith's book? We interchange our thoughts and ideas, and we're

constantly getting information so we can broaden our knowledge and serve our clients better. From all of the information I have been able to sift out of the clients I serve in Pittsburgh and elsewhere, I couldn't -- In the instance of Mellon National Bank, if they would ask me to make a financial feasibility study of the erection of Mellon Square Garage, if they were to ask me today if I would certify such for it to be financed by the H. K. Ferguson Company I would say positively no.

You say where do I have the information -- from any source I can get the information. I even started to read two newspaper publications, and you stopped me. They are publications made by the University of Pittsburgh, by the department stores, by the Office Builders and Managers Association. Any place we can get information we attempt to get it so that your backlog is such we can answer these complicated questions when they arrive.

MR. BOEHM: It is difficult, Your Honor, to say the answer is any place he can get it. I asked him what the source was.

THE WITNESS: I have numerous reports down in my office.

THE COURT: The witness has pointed out various items, University of Pitts... newspaper clippings, talking with individuals, neighbors, women, people who come in and out of town all down the line all in his field of traffic concern. That is where he gets his information.

MR. BOEHM: I am satisfied, Judge.

- - -

REDIRECT EXAMINATION

BY MR. BOREMAN:

Q What percentage of the parking operators, private parking operators, in Pittsburgh do the Plaintiffs maintain? What are the percentage of the Plaintiffs to all of the parking operators?

A About 60 per cent.

Q You testified that out of the 23,000 parking spaces these Plaintiffs have about 18,000?

A 17,000.

MR. BOREMAN: I have no further questions.

MR. BOEHM: I would just like to conclude, Your Honor, by moving to str...

that portion of this witness's testimony which relates to the financial condition of parking lot operators other than those who are Plaintiffs to this case by reason of the fact that a proper foundation for that testimony has not been laid since it is based on the hearsay that the witness has already explained in the answer to my question.

MR. BOREMAN: He is here as an expert witness, he has given his opinion. If counsel wishes to cross-examine, as he has done, going to the weight of the testimony, he is free to do so; but I think the testimony is admissible as opinion evidence. Whether the opinion is supported or not supported is a matter for the Court to decide.

THE COURT: That is for the Court to decide as to the weight of it.

MR. BOEHM: The difficulty I had, Your Honor, is that the sources of that

information aren't presently in court, I can't see them.

THE COURT: We appreciate your position. We overrule your objection. We understand the situation here. We will consider it for what it is worth.

(EXCEPTION NOTED)

MR. BOREMAN: If Your Honor please, the Plaintiffs rest. I have no further testimony.

THE COURT: Do you have any witnesses that you want to present on your side, Counsel?

MR. BOEHM: What I would like to do, Your Honor, is place on the record a motion for a compulsory nonsuit on the basis -- I suppose I should wait to see whether Your Honor wants to hear argument.

MR. BOREMAN: Your Honor, I don't know how there can possibly be a compulsory nonsuit. The issues raised in here are two; one is a legal issue which depends on the facts that were

presented here and on which no argument or brief has been filed. The second is the confiscation. The first issue on uniformity depends on facts here in part and part on the legal issue. Your Honor will have to consider the facts as applied to the law in the uniformity issue. I think we have four different grounds for that uniformity issue.

THE COURT: Counsel's position procedurally is correct, this is the time for his motion and the Court to rule, depending on how we decide, then depending on whether or not counsel would put in their side of the case as I understand it. Isn't that it?

MR. BOEHM: Yes, Your Honor.

THE COURT: Let us present that tomorrow morning, and if you want to put in your case tomorrow morning I gather we are over the hump on this.

MR. BOREMAN: Yes, Your Honor, I have no further witnesses to present unless he

presents a witness, and I may want to reserve the right to rebuttal.

THE COURT: We will give you that preroqative.

I refuse the motion for a nonsuit.

(Whereupon, the hearing was adjourned.)

- - -

September 17, 1970
Thursday Morning Session

- - -

GAYLOR J. BALZER, called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. BOEHM:

State your full name for the record, please.

Gaylor James Balzer.

Where do you live?

552 Springfield Street, City of Pittsburgh.

Are you presently employed by the City of Pittsburgh?

Yes, I am.

And in what capacity?

City traffic engineer.

How long have you been employed by the City of Pittsburgh?

Over 15 years.

In what capacity were you first employed by the city?

As an engineer of operations for the Bureau of Traffic Planning starting in 1954.

Did you receive a promotion subsequent to having filled that position?

A I was promoted to Assistant City Traffic Engineer in 1966.

Q Did you serve as Assistant Traffic Engineer until your appointment as City Traffic Engineer?

That's correct.

Could you tell the Court something of your educational background, Mr. Balzer?

I'm a graduate engineer from the University of Pittsburgh. I graduated 1952.

Do you belong to any professional societies in connection with your traffic planning experience?

Just the Institute of Traffic Engineers is the only professional society I belong to.

Mr. Balzer, in connection with your duties as the City Traffic Engineer have you had occasion to examine and determine whether or not traffic problems are caused by the existence of parking lots in the City of Pittsburgh?

MR. BOREMAN: Your Honor, I would request an offer from counsel as to what he intends to prove by this witness.

THE COURT: The gentleman has asked for an offer.

MR. BOEHM: We intend to show through this witness, Your Honor, that traffic congestion is caused in the City of Pittsburgh not by hotels, department stores and other services that are offered to people who may want to take advantage of them but by the very existence of the parking lot, that people will not come to the downtown area by automobile unless they know there is a place for them to leave that automobile while they are taking advantage of these services.

We also intend to show through this witness what the average daily cost to the City of Pittsburgh in the way of traffic policemen is which are necessary because of traffic problems created in the city.

We also want them to show that as the deficiency in parking spaces increases so does the supply of parking spaces, and we

also intend to introduce through this witness a 1963 study which was made concerning traffic in the central business district.

I think that is a fair summation of his testimony.

THE COURT: Is there any objection?

MR. BOREMAN: Just one moment.

No objection, Your Honor.

MR. BOEHM: Can you read the last question back?

(The last question was read.)

MR. BOREMAN: That is objected to, Your Honor, on the grounds it is a leading question.

THE COURT: Read that back again.

(The last question was read.)

THE COURT: The objection is overruled. Proceed. It is calling for a "Yes" or "No" answer. He just asked his if he had occasion to examine it.

(EXCEPTION NOTED)

THE WITNESS: Yes, I have.

M. BOEHM:

And what is your opinion, sir?

MR. BOREMAN: That is objected to, Your Honor.

THE COURT: We will sustain that.

Rephrase your question.

M. BOEHM:

What is the result of your examination, Mr. Balzer?

MR. BOREMAN: That is objected to, Your Honor, unless he first lays the foundation of this question to show what is the basis of his answer, what studies he has made, and everything else about it.

THE COURT: We will sustain your objection on that basis.

Set the stage, Counselor.

(EXCEPTION NOTED)

M. BOEHM:

Mr. Balzer, tell me what your duties are as a City Traffic Engineer?

To regulate traffic by the means of sign signals and

markings and make any study that is related to the flow of traffic.

Q How many people do you have working under you, approximately?

The Bureau of Traffic Planning employees have a hundred and forty some people at the present time.

Generally are these people employed to help you in your duties with respect to traffic control and regulation of traffic?

Yes, they are.

In your capacity as Assistant Traffic Engineer, what was your specific duty?

To aid the City Traffic Engineer in carrying out these specific duties.

In your capacity as Assistant Traffic Engineer and also as Traffic Engineer, did you have occasion to personally daily, almost, consider various traffic problems inside the City of Pittsburgh?

That is correct.

And as part of that study and examination did you take into consideration at all the question of the effect of the existence of parking lots in the City of Pittsburgh

on traffic in the City of Pittsburgh?

Yes. I have checked the effect of parking lots to some extent.

And as an expert do you have an opinion with respect to the question --

MR. BOEHM: Am I allowed to go on?

MR. BOREMAN: Sure. I give you permission.

MR. BOEHM:

As an expert do you have an opinion on the question of whether or not parking lots cause traffic problems in the City of Pittsburgh?

MR. BOREMAN: That is objected to, Your Honor. First, the question "What is an expert" is for the Court to determine.

MR. BOEHM: Well, that is right --

MR. BOREMAN: And secondly, simply because he was employed by the city in studying traffic I don't think he is an expert on whether the parking lots cause traffic -- he can testify what causes traffic congestion or was the situation with respect to traffic in Pittsburgh, he can testify to that; but he is

not an expert to give an opinion on whether parking lots cause traffic.

MR. BOEHM: This man is the City Traffic Engineer. There is no one more qualified to testify in any respect to traffic problems in the City of Pittsburgh.

MR. BOREMAN: This question, Your Honor, about parking lots, he was asked whether he made a study of parking lots, and I think his answer was very vague indicating not very much. He said, "I've made some --" I forget what his answer was, but I have a note here. He said, "I've somewhat made a study" or "I've somewhat considered it," or I don't know what the answer exactly was; but he certainly isn't anybody who has made a thorough study of this situation in Pittsburgh.

In the course of all his other duties in the traffic department of the City of Pittsburgh relating to traffic on the streets, putting up stop signs, regulating patrolmen and all the whole myriad of questions that come up he said, "I've made some observati

of it." That doesn't make him an expert.

THE COURT: It covers a pretty broad field, don't you think?

MR. BOREMAN: Yes, I would say that everything in Pittsburgh --

THE COURT: As I recall his testimony he testified that he made studies and recommendations relative to traffic, traffic controls and traffic regulations. Now, in those recommendations he also -- I understand his testimony to have been that he had some study of the parking lot situation. The impression that I got from it was that in connection with these studies relative to traffic control and congestion of traffic in the city, this business of parking lots and parking and whether it was on-street or off-street, came into play with his basic course of duty. Now, maybe I misconceived what the gentleman was talking about.

MR. BOREMAN: I think I would agree with that.

THE COURT: We will overrule your objection and note the exception.

(EXCEPTION NOTED)

THE COURT: I recommend this, Counselor, that you set a little more window dressing for this specific problem of parking lots, the parking problem, whether off-street or on-street with respect to the parking facilities as being tied into his recommendations; and that way Mr. Boreman will have nothing to complain about, I am sure.

MR. BOEHM:

Mr. Balzer, in connection with your duties as Assistant Traffic Engineer, your entire experience in the Bureau of Traffic Planning, did you have occasion to observe traffic problems in general and also specifically on-street parking and off-street parking? Were all of those things part of your duties in connection with your employment?

Yes, they were.

Could you tell the Court what you know as a result of your experience in the City of Pittsburgh concerning traffic problems if there is any connection with off-street parking

and by that I mean parking lots and parking garages?

I observed during different times of the day -- for example, take a look at the downtown area during the peak period, the off-peak period and the evening peak period to try to determine what has caused some of the backup of traffic on the streets, and I have found out that parking lots are part of the problem of congestion.

Now, would you say that the congestion that you are talking about can be attributed solely to people coming downtown for the purpose of visiting department stores and taking advantage of services here?

MR. BOREMAN: That is objected to.

THE COURT: We will sustain that. You are leading your witness, Counselor. Rephrase it.

(EXCEPTION NOTED)

MR. BOEHM:

Mr. Balzer, what in your opinion is the cause of that congestion?

Well, --

MR. BOREMAN: That is objected to again, Your Honor, as a question of opinion. Ask what his duties as a traffic engineer are,

what he found in the performance of his duties, a factual question, not what his opinion is.

MR. BOEHM: Your Honor, the very reason I put this witness on the stand is because he is a witness who is qualified to give an opinion. He is an expert. If Mr. Boreman wishes to conduct a voir dire as I did with respect to his alleged expert, Mr. Buzzard, he has that right and privilege, but he didn't request it.

Now, if he is still concerned with whether or not this man is an expert, I think he should be given that opportunity. I have no objection to his cross-examining on voir dire. But once he has qualified as an expert, as I understand the law, I am entitled to ask his for an opinion as long as it is within his field.

MR. BOREMAN: Your Honor, I think the facts in the record so far do not qualify him as an expert. But if Your Honor thinks

it is appropriate I will question him on his voir dire.

THE COURT: All right. Perhaps through your voir dire examination we can get back on the mainstream in this case and get to the meat of it. I will be happy to oblige you.

- - -

VOIR DIRE EXAMINATION

G. BOREMAN:

Mr. Balzer, you say you are a graduate engineer. What field of engineering?

General engineering.

General engineering?

Yes.

Your studies in the university leading to your degree had nothing to do with traffic, did they?

No, they did not.

When did you say you began work with the City of Pittsburgh?

1954.

Was that right after you graduated?

No, it wasn't. I worked for the railroad from '52 to '54.

You graduated in 1952?

That's right.

And then you went with the city in 1954?

That is correct.

And you worked in the traffic department, is that right?

That's right.

Have you ever had any connection or any duties in connection with the Parking Authority?

Not until I was appointed as a member of the Technical Board some time in July, I believe.

July of what year?

This year.

You were just now appointed a member of the Technical Board of the Parking Authority?

That's right.

What are the duties of a Technical Board member? What does that board do?

To look over the existing layouts -- proposed layouts of parking garages to try to determine methods of alleviating traffic conditions that might exist due to the building of the garage and problems that could come up concerning that garage.

In other words, to aid in planning the best way to build

a Parking Authority garage?

That's correct.

Now, you say you were a member of a society. What was the name of that society?

Institute of Traffic Engineers.

How long have you been a member of that?

I would say since about 1956.

And this was two years after you joined the city as a traffic engineer?

That is correct.

What are the qualifications to become a member of that society, the fact that you are employed by the City in the traffic department?

That's right, and you have to have so much experience in the field. It has certain grades; Junior, Associate and Member grades. And I am an Associate member which requires, if I remember right and Don McNeil could correct me, five years' experience, responsible experience, in traffic; and, I think, it requires an engineering degree, although I'm not sure of that.

You don't know whether it requires an engineering degree?

Don shook his head yes. It does.

MR. McNEIL: Yes, it does.

BY MR. BORRMAN:

Q You mean any engineering degree from any accredited college?

A That's correct.

Q Not necessarily a traffic engineer degree?

A No. There are very few colleges that give traffic engineering degrees.

Q In other words, your experience is solely in the Traffic Bureau as part of the Traffic Bureau of the City of Pittsburgh?

A That's correct.

Q Have you ever published any papers or any studies with relation to parking garages?

A No, I haven't.

Q Have you ever published any papers or studies with relation to traffic?

A No.

Q Have you ever participated in any study with relation to traffic?

A Yes.

What studies are they?

We participate in some degree to most studies that are made by the consultants that come into the city.

In other words, you furnish them the information?

That is correct.

That is your participation?

That is our participation and a review of that writeup once they publish it.

Have you ever participated in any study with reference to parking garages?

I can't frankly answer that question.

Other than furnishing information to some other bureau?

No.

You haven't?

No.

You say you have furnished information to consultants?

(Witness nods head.)

I take it you furnished information to Mr. McNeil who has testified in this case?

Information to Mr. McNeil and other consultants, yes.

I take it your furnished information to Wilbur Smith in

the study he made of the Parking Authority. Do you recall that?

A Quite possibly -- any accounts usually that have to be taken in regard to this study are taken by our bureau. Now, I am not sure that we participated in this, but I would say possibly.

Q But you personally didn't participate in it?

A No.

MR. BOREMAN: If Your Honor please, on the basis of this examination I object to this witness testifying as an expert. I have no objection to his testifying but not as an expert witness to give an opinion.

THE COURT: Do you wish to proceed with your regular examination?

MR. BOEHM: Yes, Your Honor.

MR. BOREMAN: Did Your Honor make a ruling?

THE COURT: Your objection is overruled. We are satisfied that

Mr. Balzer is qualified sufficiently through training and experience to be classified as an expert with respect to the traffic regulation and control and related matters thereto in the City of Pittsburgh.

(EXCEPTION NOTED)

- - -

DIRECT EXAMINATION (Continued)

BY MR. BOEHM:

Mr. Balzer, would you tell the Court how the problem of traffic congestion is related, if it is, to the existence of parking lots in the City of Pittsburgh?

The fact that the cars want to get to a specific lot, any great amount of cars at a particular time want to get to that same lot or lots create this traffic problem that creates a backup on the streets leading to these lots.

Do you know during what hours most traffic is on the streets of the City of Pittsburgh?

Most traffic in the City of Pittsburgh, the peak hours

are considered to be seven to nine in the morning and four to six in the evening.

Q Do you know during what period most cars are entering or leaving parking lots?

A I would imagine that from the studies that we have made that the cars are entering and the congestion occurs usually during these peak hours that we had talked about.

Q Do you know how many parking spaces there are available in the City of Pittsburgh at the present time?

A From a study that Wilbur Smith had just presented, there's -- let me just -- hold on for a minute. 24,325 spaces available in 1969 for parking.

THE COURT: What was that?

MR. BOREMAN: Just a minute, Your Honor. Wilbur Smith's study is in evidence. He is reading from a piece of paper. Is he saying that that figure is taken from Wilbur Smith's study?

THE WITNESS: That's what I am saying.

THE COURT: What was that figure

again?

THE WITNESS: 24,325.

MR. BOEHM:

Do you know at what capacity these lots are operating at the present time?

To my knowledge they are operating close to capacity if not at capacity or just a little bit over capacity.

Now, Mr. Balzer, if there were no parking spaces available in the downtown area of the City of Pittsburgh, would there be a traffic congestion problem that you have just related?

MR. BOREMAN: That is objected to as irrelevant, Your Honor. There are parking spaces and there is traffic in Pittsburgh and we have a city here. In fact, he testified they are planning new garages. That is a hypothetical question that is completely divorced from reality. What are you talking about, a fairyland?

MR. BOEHM: That is another reason you qualify a witness as an expert, Your Honor, so you can ask him a hypothetical question.

THE COURT: It has to be a little germane to the subject.

MR. BOEHM: I think it is, Your Honor.

THE COURT: I think it is, too. We will overrule your objection.

(EXCEPTION NOTED)

BY MR. BOEHM:

Q Do you remember the question, Mr. Balzer?

A No.

Q I asked you if there were no parking spaces available in the City of Pittsburgh would there be the traffic congestion problem you have just related to us?

A Not as far as the movement of automobiles with this amount of -- the less automobiles possibly that would be coming into downtown there would be less congestion.

Q Now, Mr. Balzer, as a result of your studies and research do you have a figure which you can give the Court

representing the percentage of the total downtown area that is devoted to streets and parking lots?

MR. BOREMAN: That is objected to, Your Honor. We are not arguing about parking on streets or taxing parking on streets; we are talking about parking lots, so let us separate them.

MR. BOEHM: I think, Your Honor, I should be permitted to develop the picture here of what actually takes place with respect to parking in the City of Pittsburgh. This is one way of completing the picture for the Court, what percentage of our land available in the Golden Triangle is devoted to parking lots and streets.

MR. BOREMAN: Well, ask that.

MR. BOEHM: I did.

MR. BOREMAN: You said streets and parking lots.

THE COURT: Proceed. We will

overrule your objection.

(EXCEPTION NOTED)

BY MR. BOEHM:

Q Would you answer the question?

A There's approximately 50 per cent of the downtown area involved in either street use or parking lots.

Q In connection with your duties as City Traffic Engineer did you initiate a study with respect to the backup on streets caused by parking lots?

A Yes, I did. It is just in the initiating stages. We haven't done too much about it, but we do have some quick studies.

Q When did you begin that study?

A Some time in August, late August, this year.

Q Did you begin that study at the request of the City Law Department?

A No, I didn't.

Q Did you make that study, was the study initially in any way connected with the suit which we are presently trying in court?

A No. I initiated the study on my own due to the fact that

in my overall look at the downtown area I found that parking lots were creating congestion at different periods of the day.

In connection with that study were there photographs taken?

We have some photographs, yes.

Would you show those photographs to me, please?

(Defendant's Exhibits A, B, C, D, E and F were marked for the purpose of identification.)

MR. BOEHM:

Mr Balzer, I show you what has been marked as Defendant's Exhibit A and ask you to tell the Court what that represents.

This represents a picture showing cars wanting to get into the Kaufmann's lot at Forbes and Cherry. The "Filled" sign --

MR. BOREMAN: If the Court please, I object to the question and move to strike the answer. Let him identify what it is without going into a whole

explanation. The picture speaks for itself.

THE COURT: Yes. What is it?

THE WITNESS: It's a picture of traffic congestion caused by the --

THE COURT: Just tell us what the picture --

MR. BOEHM:

At what location was the photograph taken?

The location is at Kaufmann's parking lot at Cherry Avenue and Forbes.

What date was the picture taken?

9/3/70.

MR. BOREMAN: Who took the picture?

THE WITNESS: A representative from our bureau by the name of Eugene Richey.

MR. BOEHM:

Did he do that as part of your study that was initiated in late August of 1970?

That is true.

After he took that picture did he bring it back to you and give it to you?

He did.

Did you put that in your file in connection with the

study that you were making initiated in late August, 1970?

A I did.

MR. BOREMAN: Your Honor, in order to save time I am not going to object even though it is obviously hearsay.

MR. BOEHM: What is hearsay?

MR. BOREMAN: Could we have him put his pictures in and admit them in evidence and go on and the Court can decide for itself what the pictures are rather than --

THE COURT: Do you propose to introduce this group of exhibits, Counselor?

MR. BOEHM: I do.

THE COURT: Is there any objection?

MR. BOREMAN: No objection, Your Honor.

THE COURT: We will admit them.

(Defendant's Exhibits A, B, C, D, E and F were admitted in evidence.)

BY MR. BOEHM:

Q Would you please tell us now that Exhibit A has been offered and admitted into evidence what that photograph shows?

MR. BOREMAN: That is objected to, Your Honor. The picture speaks for itself. I don't think the testimony is proper as to his interpreting what the picture says. The picture speaks for itself.

THE COURT: I think his question was what the picture showed. Isn't that the way you put it?

MR. BOEHM: Yes.

MR. BOREMAN: It shows what the picture shows, not what he thinks it shows.

MR. BOEHM: It is going to be hard for a Court to read the record and be able to tell.

MR. BOREMAN: The pictures are part of a record.

THE COURT: Proceed.

MR. BOEHM:

Do you want to answer that question, Mr. Balzer?

It shows the backup of traffic due to --

Not that. Tell me what you see in the picture. Don't make a conclusion about a backup.

It shows automobiles trying to enter the --

MR. BOREMAN: That is objected to, Your Honor, and I move to strike it. It shows automobiles lined up on Cherry Way in front of a parking garage.

For example, Your Honor, how do we know the automobile in back of the one turning is going into the garage? It could be going straight ahead. These are conclusions of what it shows. It shows automobiles. He started to say "trying to get into the parking lot." We don't know that.

THE COURT: Limit your discussion here to what counsel has asked for. As I get your testimony thus far, it is a picture depicting automobiles about to enter the Kaufmann's garage located on Cherry Way and Forbes Street in the City of Pittsburgh, Allegheny County, Pennsylvania.

THE WITNESS: Right.

(EXCEPTION NOTED)

BY MR. BOEHM:

Q Is the lead automobile in that line entering the garage?

A The lead automobile is entering the garage.

Q Does it also show cars in back of it all the way back to the intersection?

A It does.

Q What was the date that photograph was taken?

A 9/3/70 or September 3, 1970.

Q And what time of the day was it taken?

A Eleven-thirty in the morning.

Q Is there a sign also shown in the --

THE COURT: What day was it?

THE WITNESS: September 3, 1970.

BY MR. BOEHM:

Is there a sign also shown in that photograph -- I will strike that question.

THE COURT: I don't want to be facetious, but Kaufmann's weren't having one of their Golden Triangle sales that day, were they?

MR. BOEHM: I don't know, Judge. Not so far as I know.

BY MR. BOEHM:

I show you now what has been marked as Defendant's Exhibit B and ask you to tell me where that photograph was taken.

A At the same location from a different angle.

Q At what time of the day was it taken?

A Eleven-fifteen in the morning, August 24, 1970.

Q Is there a sign shown in that photograph?

A The sign that we made from our shop depicting the hour of the day and the month and the year shown.

Q Is there another sign also shown in the photograph?

A Yes, there is a sign that shows, "Sorry, filled." It shows the hour, the day, the month and year.

MR. BOREMAN: Can you see this (indicating), Judge, that it says "Sorry, filled"?

THE COURT: Yes. It is over at the other end of the garage but it is facing in instead of out.

MR. BOREMAN: I just want to know if you can read the letters on this. I know I can't.

BY MR. BOEHM:

Q Now, do you know, Mr. Balzer, whether or not that sign is put there so that traffic will not enter the garage?

MR. BOREMAN: May I hear the question again?

MR. BOEHM: Does he know the purpose of the sign being placed there when the photograph was taken.

MR. BOREMAN: That is objected to, Your Honor. If a sign says, "Sorry, filled," you don't need a witness to tell you the purpose of the sign.

MR. BOEHM: Fine. We will make that part of the record. We can stipulate, then, that the sign was placed there?

MR. BOREMAN: We can't stipulate anything about the sign. I am just objecting to the question.

THE COURT: As I told you fellows yesterday, you have to leave something for the Court's imagination.

MR BOEHM: We will strike that question, Your Honor.

THE COURT: All right.

MR. BOEHM: Would Your Honor like to see Exhibit B?

(The exhibit was handed to the Court.)

MR. BOEHM:

I show you now, Mr. Balzer, what has been marked as Defendant's Exhibit C and ask you at what location that was taken?

It's the same location showing the same condition.

MR. BOREMAN: I move to strike the word "condition." The testimony of the same location is not objected to.

THE COURT: All right, we will strike the word "condition." We have identified the exhibit as being the same location as the prior exhibit.

(EXCEPTION NOTED)

MR. BOEHM:

Mr. Balzer, I show you what has been marked as Defendant's Exhibit D and ask you if that photograph also shows the same location?

And that is a leading question.

MR. BOREMAN: I have no objection.

THE WITNESS: That's the same location.

MR. BOEHM:

What date was that picture taken?

10:45.

That is the time, right?

That is right.

Do you know what date it was taken?

The date is on the clock,the sign. Right at the present time I can't pick it out.

MR. BOREMAN: Do you know what date it is? Tell him. I have no objection.

THE WITNESS: I would imagine it was taken the same day.

MR. BOREMAN: All right.

THE WITNESS: All these pictures were.

MR. BOEHM: It was definitely August.

MR. BOREMAN: What is his testimony, August or September?

THE WITNESS: August.

MR. BOEHM: I can see "August" there without my glasses.

THE COURT: Yes, but it doesn't mention what year.

MR. BOEHM: See, (spelling) A-u-g.

MR. BOREMAN: Let us have the witness's testimony.

Do you or don't you know when it was

taken? If you don't know, say so.

THE WITNESS: I don't know exactly when the picture was taken.

BY MR. BOEHM:

Q Do you know what month it was taken?

A It was taken in August, and possibly a magnifying glass will verify it.

Q I show you now what has been marked as Defendant's Exhibit E and ask you if that is also a photograph of the same location?

A Same location.

Q And the picture was taken at eleven-thirty on August 24, 1970, wasn't it?

A That's correct.

MR. BOREMAN: Quit leading the witness. I object to the leading question.

Does it show that or doesn't it?

MR. BOEHM: Here (indicating) it is, 11:30, August --

MR. BOREMAN: Let him testify. What date was it taken?

BY MR. BOEHM:

Q Mr. Balzer, does this photograph indicate at what time

the picture was taken?

A Yes, it does.

Q Does that photograph have a clock in it?

A It does.

Q And do the hands on the clock show what time of the day it was when the picture was taken?

A Yes, it does.

Q Will you please tell the Court what the clock says?

A Eleven-thirty.

Q Does the photograph have also on it --

MR. BOREMAN: Ask him when it was taken period.

We will save a lot of time, Your Honor.

MR. BOEHM: It is right there.

THE COURT: Ask him the question whether he knew whether the clock was operating or not. We have gone so far now we may as well play out the string and get totally ridiculous.

What was the date the picture was taken, if you know?

THE WITNESS: August 24, 1970.

THE COURT: Now, what is the next one?

MR. BOEHM: Exhibit F.

BY MR. BOEHM:

Q Mr. Balzer, tell the Court where the photograph was taken.

A Same location.

Q Do you know the time that this picture was taken?

A Eleven-thirty.

Q Was that taken at the entrance to the garage?

A That is correct.

Q What garage is that?

A That's at Kaufmann's garage, corner of Forbes and Cherry

Q Now, are they the only locations to date, Mr. Balzer --

MR. BOREMAN: Just a moment. So the record may be clear, Your Honor, I want the record to show that I object to the admissibility of the pictures on the ground they are hearsay, improper identification. This witness did not take the pictures, and I think they are not qualified, he wasn't even there at the time. I want the record to show an objection.

THE COURT: We will overrule your objection and note the exception. We will

permit the exhibits for whatever they may be worth. It is for the Court to decide the relevancy of them and the value of them. The Court is most familiar with that particular garage.

(EXCEPTION NOTED)

BY MR. BOEHM:

Were there, Mr. Balzer, in connection with your study which was just initiated in the latter part of August of this year photographs taken of any other locations?

No. We haven't got that far yet.

This was the first location that you selected, is that right?

That is correct.

THE COURT: Were there any exhibits taken of any of the garages of the Plaintiffs involved in this case, to your knowledge?

THE WITNESS: This is the only one that was taken. I don't know what garages were involved.

MR. BOEHM: The witness has already testified these pictures were not taken in

connection with this lawsuit. This is a study --

THE COURT: I am not concerned about that phase of it. I was just questioning what pictures he took, and I asked the question as to whether or not any garages of those involved in this lawsuit were photographed.

MR. BOEHM: These were the only pictures taken, Your Honor, just one garage. There aren't any more at this time.

BY MR. BOEHM:

Q Is that right, Mr. Balzer?

A That is correct.

Q Now, Mr. Balzer, also in connection with your study which was initiated in the latter part of August of this year, did you obtain information from the Bureau of Police concerning the stationing of policemen at various garages in the City of Pittsburgh?

MR. BOREMAN: That is objected to as hearsay, what information he obtained from police. He is not going to testify what

policemen told him. Let us have the policeman. Let us have what he knows of his own knowledge, not what policemen told him. That is hearsay.

THE COURT: Be a little more specific, Counselor.

(EXCEPTION NOTED)

BY MR. BOEHM:

Q Did you request information from Lieutenant McMahon in conjunction with your study that you were making?

A Yes, I did.

Q What information did you ask Lieutenant McMahon to obtain for you?

A Where policemen were placed that were involved in aiding or helping to move traffic into or out of the parking lot.

Q And did Lieutenant McMahon reply to you in writing?

MR. BOREMAN: That is objected to, Your Honor, unless we know who Lieutenant McMahon is; and secondly, anything that Lieutenant McMahon either said or wrote is Lieutenant McMahon's testimony, not his. It is hearsay.

I have no opportunity to cross-examine Lieutenant McMahon.

THE COURT: If you feel that is relative, bring him in; but for the purpose of this hearing we will overrule your objection and note the exception. I am sure counsel is going to tie all of this in. In connection with his report he did the same thing as your experts did in compiling your information, and we didn't require the auditors to come in.

(EXCEPTION NOTED)

MR. BOEHM: Or the newspapers.

THE COURT: You see, it works both ways, Counselor.

MR. BOREMAN: Your Honor, the thing that I had my expert testify to was the figures. Now, what he is saying is Lieutenant McMahon is going to give him an opinion as to what traffic is --

THE COURT: The question that was put was whether or not he asked Lieutenant McMahon to give him information with respect

to the number of officers that were placed in an effort to aid traffic conditions at the various parking areas, as I understand the question.

MR. BOEHM: That is right, Your Honor.

MR. BOREMAN: The question was the number of officers that were placed with respect to traffic. I didn't understand him to say with respect to parking areas.

THE COURT: What I suggest is that you get in the groove here and follow the conversation. You anticipate too many things before you know what the question is.

Proceed.

(EXCEPTION NOTED)

MR. BOEHM: I will ask the question I last asked.

BY MR. BOEHM:

Q Did Lieutenant McMahon reply to you in writing?

A Yes, he did.

Q Do you have the written reply of Lieutenant McMahon with you in court?

A I do.

May I have it?

(It was handed to counsel.)

(Defendant's Exhibit G was marked for the purpose of identification.)

BY MR. BOEHM:

Q Has the written reply of Lieutenant McMahon been marked Exhibit G?

A Yes, it has.

Q What is the date of Lieutenant McMahon's report, Mr. Balzer?

A September 19, 1970.

Q 16?

A September 16, 1970.

Q And that is the date that is right on the report?

A That is correct.

Q Is that signed by Lieutenant McMahon?

A Yes, it is.

Q Do you remember when it was that you requested that information from him?

A September 15, 1970.

MR. BOEHM: I offer in evidence Exhibit G.

MR. BOREMAN: If Your Honor please, that is seriously objected to, for what that

report says I have a right to cross-examine Lieutenant McMahon very thoroughly. I seriously object to this being in evidence as pure hearsay and depriving me of my rights to cross-examine Lieutenant McMahon.

THE COURT: We will hold our ruling in abeyance until you bring in Lieutenant McMahon to authenticate his report and give you an opportunity to cross-examine him, if that is what you request.

MR. BOEHM: Okay.

MR. BOREMAN: Your Honor, these aren't matters of public records like the other statistics were. I think it is purely hearsay.

THE COURT: To a degree I concur in your thinking. By the same token, the compilation of that report and the statistics as indicated on that are no different than the compilation of the figures taken from the Plaintiffs' books and records and submitted to the gentleman who made this overall Exhibit 1 that you

presented in court. There is no difference technically.

MR. BOREMAN: May I point out, Your Honor, there is quite a difference. The books and records are available to check whether those figures are right. We have nothing to check unless we get Lieutenant McMahon.

THE COURT: That is why I suggest to you if you request it we will have Lieutenant McMahon come in.

MR. BOREMAN: I do so request.

MR. BOEHM: We can do it, Your Honor, the same as Wilbur Smith could have been asked to come in in connection with his report, and we didn't even have the testimony from all of the people in connection with the --

MR. BOREMAN: There are no dates on that, there are no times on that. It's just a flat statement. The date of the report is dated September 16, but the times he stationed them there, how many policemen were there, where were they --

THE COURT: That is just a report of the number of policemen necessary at the respective

places that he suggests in his report.

MR. BOREMAN: It doesn't say whether they are there, Your Honor. You see, Your Honor, we are satisfied, we believe from actual experience that there were no policemen stationed in those places and our people so testified.

THE COURT: Are you making a request that the officer be brought in so you will have an opportunity to cross-examine him?

MR. BOREMAN: First I object to the evidence as hearsay. If Your Honor overrules me then I am making a request that the policemen come in.

THE COURT: We are not going to make a ruling on this until you have had an opportunity to cross-examine the witness, and then we will decide whether or not this exhibit is proper or improper.

MR. BOREMAN: Very well, Your Honor.

THE COURT: Are you making that request?

MR. BOREMAN: Yes, I am.

THE COURT: How soon can you get the

officer here?

MR. BOEHM: We will try and have him here in five minutes, Your Honor. My co-counsel will request that he appear immediately.

THE COURT: I suggest that you proceed with some other phase of the examination of Mr. Balzer and we will pick up this latter phase when the officer gets here.

MR. BOEHM:

From your experience in the Bureau of Traffic Planning and particularly in connection with your studies initiated in the latter part of August, would you tell the Court why, assuming that that information is properly authenticated, those policemen are placed at those locations?

MR. BOREMAN: That is objected to, Your Honor, until the preliminary matter is disposed of that Your Honor indicated. I think any questions related to that exhibit are improper at this time.

MR. BOEHM: I will withdraw it.

BY MR. BOEHM:

Q Do you know, Mr. Balzer, anything of the functions of a traffic policeman at an intersection in the City of Pittsburgh in the vicinity of a parking garage?

A Yes, I do.

Q Would you tell the Court what you know about that?

A Generally a policeman is placed on the intersection to keep the traffic moving and the intersection clear. And if necessary he will move down to let some of the parking lots unload or load, whichever time it may be, while he's working the intersection.

Q Do you know in fact whether or not policemen stationed at intersections actually do this, move to the garage?

A They do at times, yes, to try to clear the congestion.

Q Let us take the intersection of Forbes and Cherry where the photographs were taken.

Is there a problem of congestion at that intersection to your knowledge?

A There is.

Q Why is that?

A Mainly due to the cars wanting to get into the parking garage.

Q Mr. Balzer, did you at my request in connection with this

lawsuit presently being tried before His Honor Judge Wessel obtain some figures as to the cost to the City of Pittsburgh with respect to traffic policemen employed per day?

Yes, I did.

Do you have those figures with you?

I took them over the phone. I have the figures.

From whom did you obtain those figures?

I obtained these figures from Lieutenant Jordan of the Police Department.

MR. BOEHM: Do you want him to --

MR. BOREMAN: Are these public records?

MR. BOEHM: I would think they are. I think they would be reflected in the budget.

MR. BOREMAN: Yes, I would like Lieutenant Jordan here to cross-examine him.

MR. MARKS: Your Honor, I am sorry to interrupt, but you have this witness who has testified to photographs which he didn't take at a time when he wasn't there, and now he has testified about statistics that he didn't compile, that was the second thing. Now he is testifying about a telephone conversation about

statistics that another man compiled, and in all three of these instances he didn't do anything except speak to somebody else who did the work and just copy down what they said. I don't see how the Plaintiffs can be expected to cross-examine this man on any of that because he didn't do any of that. All he says is that is what the fellow told him.

THE COURT: You are quite right.

MR. BOEHM: I agree, Your Honor, but what we have here is an expert who has made a study and obtained information. Now, I can bring everyone in that he obtained the information from, but I think the Court should take into consideration that it does take time to do that and also Mr. McNeil came here prepared with all kinds of statistics, got his information from various sources, some of them including some place in the Department of Safety, and the Court accepted that testimony without requiring the gentlemen. As a matter of fact, the Court got a little bit upset with me in even pursuing the line of information a

to where the information was obtained.

But I think if they have a right to bring in every man from whom that information was obtained then I have a right to bring in that man that Mr. McNeil contacted.

THE COURT: You had that right if you requested it, but you didn't.

MR. BOEHM: All I really wanted to know was where he got the information and I couldn't even find that out without the Court telling me I had better pursue some other line of examination.

MR. BOREMAN: If we want to know the number of policemen, that should be a very simple matter.

THE COURT: Gentlemen, certainly we understand that all of this and the approach to this was on the basis of more or less expert testimony so that we could alleviate bringing in a lot of the individuals that went into the ultimate report or at least their work and their thinking and their discussions and their recommendations, whatever they may have been. We appreciate that in an effort

to save time and get to the meat of this case.

But by the same token, in the interest of justice, if either side or both request that those who were involved in the compilation of these reports and the information that is germane to the issues involved in this case, then the Court is compelled to abide by their request and have those witnesses presented.

If you ask that those witnesses be here --

MR. BOREMAN: Yes, Your Honor, I do.

THE COURT: I will honor your request.

MR. BOREMAN: Because this is the crux of this case, the very crux of it.

THE COURT: We would have obliged you, Counselor, had you made such a request.

MR. BOEHM: I didn't even know who to ask for, Judge. I couldn't find out.

MR. BOREMAN: In the case of the figures, Your Honor, we would have to have a mountain full of papers and accountants, and the case of Lieutenant Jordan is one man.

MR. BOEHM: All right, he will be next after McMahon.

THE COURT: Who are you requesting here so that I don't get lost in the scuffle?

MR. BOREMAN: Lieutenant McMahon and now Lieutenant Jordan, as I heard the names.

MR. BOEHM: It is going to be difficult if Lieutenant Jordan says he called somebody. We will try. We will bring in the person he called then.

MR. BOEHM:

Mr. Balzer, did you have an opportunity to review the -- Do you know what the Wilbur Smith report says concerning the deficiency of parking spaces with respect to the supply of spaces in the city? Did you make a note of the items mentioned in it?

I did. In 1955 there were 14,830 spaces of which at that time there was a deficiency of 2400 spaces. In 1969 from Wilbur Smith's report there were 24,325 spaces with a deficiency of around 4700 spaces.

So that as the supply increased so did the deficiency?

That is correct.

Do you know whether or not today there is an existing deficiency of parking spaces in the City of Pittsburgh?

There is in the downtown area, yes.

Q Do you know what number we are in need of or what the deficient number is in the city today?

A From the Wilbur Smith study he gives a figure of around 4700 cars.

Q Mr. Balzer, do you know during what months of the year the traffic volume is highest in the city?

A The months of September, October, November, December are high. January and February usually into March are --

Q Which are the highest?

A The latter months of the year.

Q September to December?

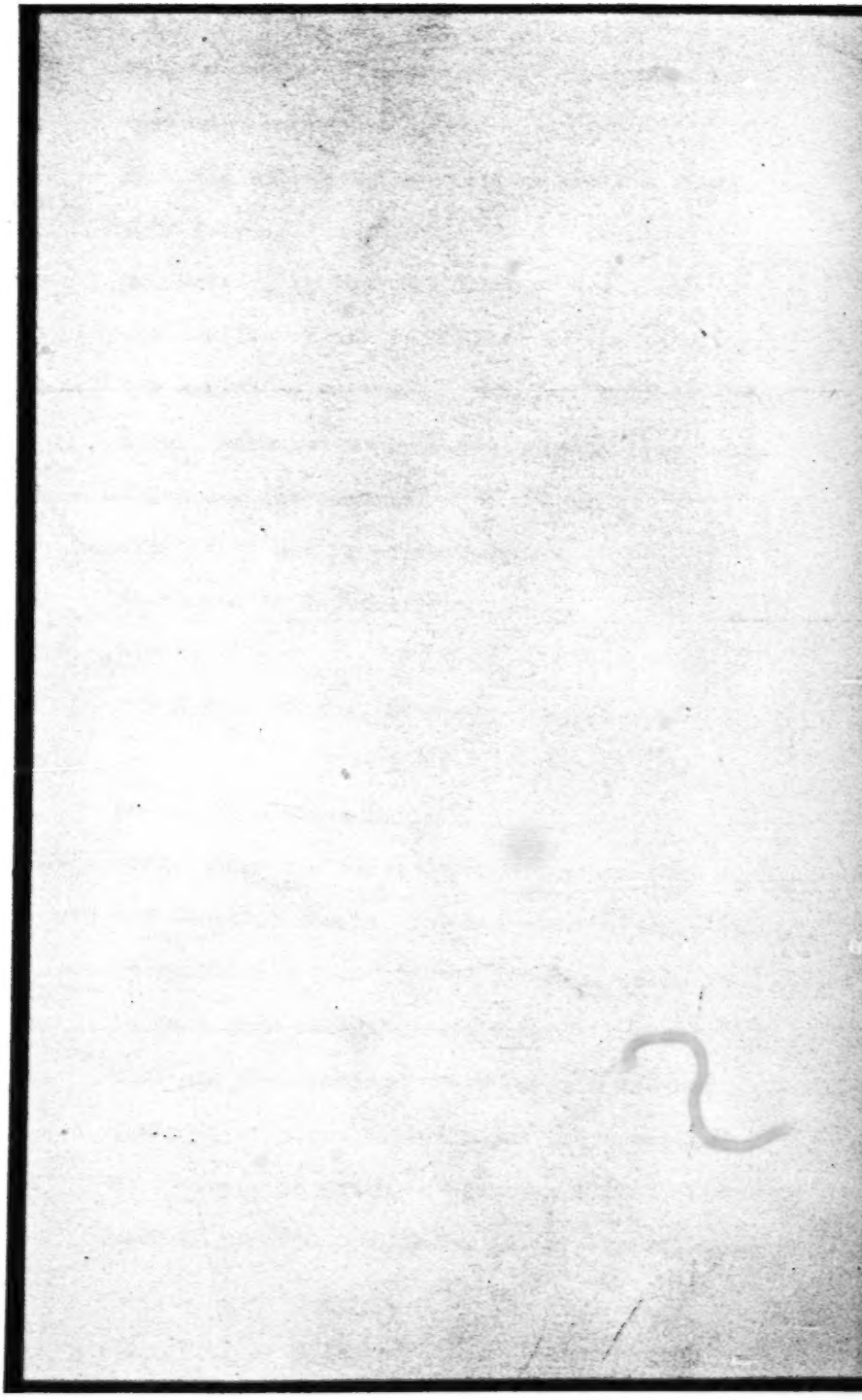
A Right.

Q The latter months, is that what you said?

A Yes.

Q Do you know why that is?

A Well, there's several reasons for it. The summer months are vacation months, for one reason, and people are away on vacation. In September it picks up because everybody is back from vacation, the schools are starting, people -- colleges are opening. Then we have the attraction to the downtown area for business due to Christmas, so forth. Mr. Balzer, do you have with you a 1963 study which was made of traffic conditions in the central business district



INDEX TO RECORD

Volume I

Docket Entries 1a

Complaint 4a

Exhibit "A", Ordinance No. 704 (printed in the Appendix to the Petition for Certiorari at pages 103a through 110a) 11a

Answer 12a

The Evidence:

Plaintiffs' Evidence:

H. W. Shepard, Jr.:

Direct Examination 18a

J. S. Buzzard:

Direct Examination 41a

Voir Dire Examination 49a

Direct Examination 60a

Cross-Examination 92a

Redirect Examination 131a

Recross-Examination 142a

Redirect Examination 144a

H. W. Shepard, Jr.:

Direct Examination 146a

Plaintiff's Evidence(Cont'd):

Cross-Examination 168a

Redirect Examination 192a

Recross-Examination 197a

J. T. Stabile:

Direct Examination 199a

Cross-Examination 214a

Redirect Examination 233a

P. B. Smith:

Direct Examination 236a

Cross-Examination 247a

Redirect Examination 258a

Recross-Examination 259a

S. P. Gline:

Direct Examination 260a

Cross-Examination 270a

Redirect Examination 271a

P. B. Smith:

Recross-Examination 272a

D. M. McNeil:

Direct Examination 274a

Cross-Examination 298a

Plaintiffs' Evidence (Cont'd):

Redirect Examination 326a

Recross-Examination 329a

Redirect Examination 352a

Defendant's Evidence:

G. J. Balzer:

Direct Examination 357a

Voir Dire Examination 369a

Direct Examination 375a

Volume II

Defendant's Evidence (Cont'd):

J. L. Crosetti:

Direct Examination 412a

Cross-Examination 422a

Redirect Examination 434a

Recross-Examination 435a

Redirect Examination 440a

Recross-Examination 441a

Redirect Examination 443a

W. E. Jordan:

INDEX TO RECORD

Defendant's Evidence (Cont'd):

Direct Examination 444a

G. J. Balzer:

Direct Examination 449a

Cross-Examination 450a

Redirect Examination 474a

J. R. McMahon:

Direct Examination 477a

Cross-Examination 481a

Redirect Examination 490a

Recross-Examination 493a

Exhibits:

Plaintiffs' Exhibits:

1 Date Pertaining to the Parking Operations of the Plaintiffs in the Pittsburgh Parking Tax Case 496a

3 Comparison of 1969 Receipts from the Business Privilege, Mercantile, and Parking Taxes, and the Number of Taxpayers or Business Facilities Paying Each Tax 597a

6 Parking Rates in Effect, 1969 and 1970 and 1967 and 1968 598a

7 Average Parking Rates 600a

Plaintiffs' Exhibits (Cont'd):

9 Ordinance No. 675 601a

10 Alco Parking Corporation, Allegheny Center Garage, Financial Statements, December 31, 1969 608a

11 Parking Study, Central Business District, Pittsburgh, Pennsylvania, 1969, prepared for Public Parking Authority of Pittsburgh, Pennsylvania, by Wilbur Smith and Associated, June 1970 614a

12 Statement, background and qualifications of Donald M. McNeil 687a

Defendant's Exhibit:

H Traffic study in the central business district of the City of Pittsburgh 691a

Adjudication and Decree Nisi of the Court of Common Pleas of Allegheny County (printed in the Appendix to the Petition for Certiorari at pages 84a through 102a) 732a

Exceptions to Decree Nisi 733a

Opinion and Final Decree of Court en banc, Allegheny County, Pennsylvania, (printed in the Appendix to the Petition for Certiorari at pages 78a through 83a). 736a

INDEX TO RECORD

Opinion of the Commonwealth Court of Pennsylvania (printed in the Appendix to the Petition for Certiorari at pages 56a through 77a)	737a
Petition for Reargument	738a
Order	743a
Opinion of the Commonwealth Court, after Reargument (printed in the Appendix to the Petition for Certiorari at pages 51a through 54a)	744a
Petition for Allowance of Appeal	745a
Answer to Petition for Allowance	755a
Reply to Answer of the City of Pittsburgh to Petition for Allowance of Appeal	775a
Exhibit "A" attached to Reply, Opinion, Silvestri, J., in Public Parking Authority et al v. City of Pittsburgh, at No. 687 July Term, 1972	783a
Per Curiam Order of the Supreme Court of Pennsylvania	799a
Opinion of the Supreme Court of Pennsylvania (printed in the Appendix to the Petition for Certiorari at pages 1a through 49a	801a
Petition for Reargument, 7/12/73	802a
Answer to Petition for Reargument	812a

INDEX TO RECORD

Order of the Supreme Court of Pennsylvania (printed in the Appendix to Petition for Certiorari at page 50a) 821a

of the

A Yes, I

Q Would

the City of Pittsburgh?

, I have.

ld you show that to me, please?

(It was handed to counsel.)

MR. BOEHM: You have no objection to that?

MR. BOREMAN: No objection.

(Defendant's Exhibit H was marked for the purpose of identification.)

MR. BOEHM: I offer in evidence, Your Honor, what has been marked as Defendant's Exhibit H, which is a traffic study of conditions in 1963 in the central business district of the City of Pittsburgh.

THE COURT: Of 1963?

MR. BOEHM: 1963. Mr. Boreman has no objection.

MR. BOREMAN: No objection.

THE COURT: We will admit it.

(Defendant's Exhibit H was received in evidence.)

THE COURT: Is that the latest study that has been made, do you know, Mr. Balzer?

THE WITNESS: It's the latest cordon count that was made.

MR. BOEHM: I ask permission to have this witness leave the stand and have another witness take the stand pending the arrival of Lieutenant Jordan.

- - -

JOSEPH L. CROSETTI, called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BOEHM:

Q State your full name for the record, please.

A My name is Joseph L. Crosetti.

Q Where do you live?

A 428 Sulgrave Street, Pittsburgh.

Q Are you the Treasurer of the City of Pittsburgh?

A I am.

Q How long have you been Treasurer of the City of Pittsburgh?

A Since January 13, 1970.

Q Prior to that time, Mr. Crosetti, what was your occupation?

A I was Chief Economist of Jones and Laughlin Steel Corporation in their Market Development Division. Prior

to that I was their Chief Economic Planner in their Sales Analysis Division.

Q What is your educational background?

A I'm a graduate of Ohio State University. I have a bachelor, B.S. degree and I have a master of business education degree with a major in economics and marketing.

Q Mr. Crosetti, as a result of the testimony introduced by the Plaintiffs in this case have you had an opportunity to make a compilation of the parking taxes paid by those Plaintiffs and compare them with the gross receipts received from parking by those Plaintiffs?

A Yes. Members of the parking tax bureau compiled the gross receipts and the tax paid for the same parking institutions which are submitted in the Plaintiffs' first exhibit and we have totaled those numbers. They indicate --

Q Could I see those, please?

A Yes. This (indicating) is the information for the six months of '70, the six months of 1969, the years '68 and '69 compiled with three Authority garages in and compiled with the three Authority garages out.

Q Did you use those figures, Mr. Crosetti, to make a comparison of the years 1968 and 1969?

A Yes, sir, I did.

Q And was there a five per cent increase in the parking tax from 1968 to 1969?

A Yes.

Q That was from 10 to 15 per cent?

A Correct.

Q Could you tell us what your comparison revealed?

A For these installations, the total gross receipts and the total taxes, for example for the year '68 was $5,836,714.00. The taxes that were related to those same institutions were $558,875.00 leaving revenues after parking taxes of $5,277,839.00.

Now, for the year '69 those same figures provided us with a total of $6,410,291.00, taxes of $908,358.00. If you subtract the taxes from the gross receipts you receive a number of $5,501,933.00 which indicates roughly a $325,000.00 increase in gross receipts of these institutions from '68 to '69 after taxes.

Q So that there was an increase in gross receipts after the five per cent increase in the parking tax?

A That is correct.

Q Did you also, Mr. Crosetti, compare the first six months of 1969 with the first six months of 1970?

A We did.

were these figures obtained from your official records in your treasurer's office?

That's correct. These would have been obtained from the taxes filed by these same garages.

What did that comparison show?

That comparison after you subtract the taxes made for the first six months of 1969 from the gross receipts of 1969 in the first six months is $2,775,798.00. When you conduct that same calculation for the year 1970 the number is $2,764,632.00, a decline of approximately $11,000.00 in gross receipts. That was a decline of $11,000.00 out of a total of $2,764,000.00 or a three-tenths of one per cent decline in gross receipts in the six-month comparison.

That is the first six months that we are comparing?

That's correct. That's the only period for which there would have been official data.

Mr. Crosetti, does the city operate any parking facilities in the City of Pittsburgh?

Yes, we do.

Does the city operate a parking facility at the Monongahela Wharf?

Yes, we do.

Q Could you tell the Court what the experience of the city was at that particular location with respect to price increases there?

A Yes, sir. Until May 21 of 1970 and for the entire year of 1969 the price charged for all-day parking during the week at the wharf was 75 cents. On May 21 at my request or prior to that Council made effective a price increase largely doubling the price of parking at the wharf from 75 cents to a dollar and a half.

Do you want me to recite the experience that we have recorded?

Q Go ahead.

A We have only had experience for four months from May 21 of this year and have made a comparison with the similar months for the year 1969, the first full month at which the price increases were in effect give us this experience.

In the year 1970, June, we collected $19,752.00 for parking receipts on the wharf. For that same period in June, 1969 we collected $14,665.00 as revenues. The number of automobiles in 1969, the month of June, was 19,150; for a comparable month in June, 1970 it was 16,291. The first year --

MR. BOREMAN: Sorry, I didn't get those

figures. Would you mind repeating those figures?

THE WITNESS: 16,291 in June, 1970.

MR. BOREMAN: What was it in 1969?

THE WITNESS: In '69 that number was 19,150. It indicates approximately a 3,000 number automobile decline in the parking because we doubled the rate but a $5,000.00 increase in our gross receipts.

I could recite similar statistics for July and August. I will give you the latest month of August. The number of cars parked in June -- 1969, August, was 19,275. For 1970, August, it was 19,801. The number of cars has already come back to something similar to the former practice.

The income the city is receiving has gone from in 1969 $14,456.00 for August to August of 1970, $23,024.00, a -- excuse me, a $9,000.00 increase or almost a 50 per cent increase.

MR. BOEHM:

Could you tell the Court something of the location of the

Monongahela Wharf with respect to the core area of the City of Pittsburgh?

I know Judge Wessel knows, but I am making a record.

A The wharf is located along the Monongahela River at about 30 feet below the average level of the streets that surround it. Consequently, it is not the most desirable parking location because one has to walk up steps at two locations and climb approximately three floors of steps. It is in my opinion a marginal parking area.

Q Would you tell the Court, Mr. Crosetti, what effect, and this is based on your experience as an economist and also the experience that you have gained with respect to parking as City Treasurer of the City of Pittsburgh, the charge that is made for parking has on the demand of parking? Would you just explain that to the Court?

A May I use a term which economists use frequently? It is called the demand curve. At any particular point in time the demand for a particular product has to be related to the price of it. At very low prices, obviously, the demand for a product increases; at very high prices, the demand for a product would diminish. Usually there is a continuum in that it changes gradually and every businessman is obviously trying to locate himself along his demand curve at a point where he will maximize his income

so as to increase his gross receipts.

The city's doubling of our parking fees indicates that we were formerly not operating anywhere near a maximum of our demand curve. It's not clear from purely doubling it that we are now at a maximum in our demand curve.

Q What relationship does this have with respect to the ability of a businessman to pass onto the consumer any increase in price?

A These are the normal problems that every businessman has to deal with when he is faced with fluctuations in his cost structure. He must at some point decide what price he places upon the product he offers for sale to the public. When his wages increase or any other cost increases he has to make that determination or make less profit.

Q And with respect to parking, Mr. Crosetti, or I suppose other businesses, also, where volume is concerned, what is significant about volume increase or decrease with respect to price?

A Well, unless the parking garages are operating at a maximum capacity whereby they can under no circumstances increase their volume, there would be opportunity to increase their gross receipts and thus alleviate any

cost increases that they are faced with.

Q You have heard the testimony given in this case, you were in court, is that right?

A That's correct.

Q How does a businessman determine the price that he should charge or how does he know whether he is charging his maximum price?

A He can conduct many studies to determine a theoretical way. In an actual situation he just does it and determines what actually happens in practice.

Q If he hasn't experienced a due increase in volume is he able to tell whether or not he can charge more?

A That would be so, yes. There is nothing in Exhibit A which I have looked at -- I don't know whether I referred to it correctly, the first exhibit.

Q Exhibit 1?

A Exhibit 1 -- that would indicate in any way from an economist's point of view that the price increasing remedies have been exhausted by any of the garages presented in that report. As a matter of fact, Mr. Smith's testimony of Meyers indicated just to the contrary.

MR. MARKS: I object to his commenting a

other people's testimony. Is he going to testify on the facts or not?

THE WITNESS: If you will hand me Exhibit 1 I will point out the specific facts.

In the detailed explanation of expenses shown for the years '70 and '69 under the Meyers Parking System exhibit, it was demonstrated by Mr. Smith that they were able to reduce their costs so as to take into consideration the fact that they were not making profits at the rate they desired.

MR. BOREMAN: Can we have something more detailed about that? What costs?

THE WITNESS: The cost figure of $77,000.00 for payroll, for example, per dollar of gross revenue versus $86,000.00 per dollar of gross revenue and then when you add up the rest --

MR. BOREMAN: Is that a decrease from seventy-seven to eighty-six?

THE WITNESS: On a ratio basis.

MR. BOREMAN: Well, go ahead.

MR. BOEHM: I think we should permit

him to go ahead, and then you will have an opportunity to cross-examine him after I am finished.

MR. BOREMAN: I am sorry. I apologize.

MR. BOEHM: You may now begin your cross-examination.

- - -

CROSS-EXAMINATION

BY MR. BOREMAN:

Mr. Crosetti, you said something in the beginning about those figures you were reading off.

Does that include the Parking Authority?

No, I did not include the three Parking Authority garages which were formerly included under Parking Service Corporation. I have those figures, however.

I am talking about the figures you read off.

No, I did not include --

It does not include the Parking Authority?

Under Parking Service Corporation, no.

Is it included?

It included 55 institutions, and I think there was a few that were handled by leasing included in Exhibit 1 which were included here. I will give you a copy of --

Let me getit clear.

The figures you read off, do they include the Parking Authority facilities operated by Parking Service Corporation?

No, those (indicating) do not.

Mr. Crosetti, I believe you stated that there was a decline in the gross receipts for the six months of 1970 as compared to the six months of 1969, is that right, or am I wrong?

That's right. In a six-month comparison for 55 garage institutions there was an $11,000.00 decline in gross receipts.

Do you have any figures on net income? Do you know whether there was a decline in net income?

That data is not available to me.

You have seen Plaintiffs' Exhibit 1, have you not?

Yes, I have.

You have made no independent study of your own?

No. The data would not be available to me, sir.

Is that because the parking tax is on gross receipts?

Correct.

Now, Mr. Crosetti, as an economist, for a 20 per cent tax on gross receipts, assuming that this were the first time that the parking tax was passed, how much of an increase

would there have to be in gross receipts to cover that 20 per cent tax? Have you computed that?

A Roughly 20 per cent. It would be the inverse number but --

Q Are you testifying to us that roughly 20 per cent would be the amount of the increase?

A If the garages wished to pass it on to their customers.

Q If they wished to pass it on to their customers what percentage of increase would they have to put on to cover a 20 per cent tax?

A Well, you have to make an arithmetic presumption that you are starting out with the number 80 and then if you impose a 20 per cent tax on 80 you would suddenly come up with 16 units which would give you a number of 96; and then if you said, "What is the tax on a gross of 96 at 20 per cent," you keep coming back on yourself. But roughly a 20 per cent tax would result in a larger increase.

Q Yes, so that if you start with a dollar of gross receipts without any tax, isn't it a fact that it would take a 25 per cent increase or $1.25 to cover that 20 per cent tax, isn't that true?

A That's rough arithmetic.

Q As a matter of fact, if you sat down and figured it you

would see that for a 20 per cent tax to be passed on, the gross receipts must be increased 25 per cent. Would you agree to that?

I would agree to that.

So in taking into consideration the figures that you read off showing an increase in gross receipts, did you calculate whether that increase would take care of the increase in taxes?

MR. BOEHM: You are talking about the 20 per cent or the 5 per cent increase?

MR. BOREMAN: I am talking about the 5 per cent increase, obviously, from 1968 to 1969.

THE WITNESS: I didn't do it on a percentage basis. What we did was start out with the gross receipts for both six-month periods. We subtracted from the gross receipts of both six-month periods the taxes actually paid and came up with their net receipts, in effect, after parking tax. So that the number I quoted that had declined by $11,000.00 contained no taxes in it. You can't really compare what increase would be required

there to account for the tax that had already been deducted.

BY MR. BOREMAN:

Q So if their receipts declined $11,000.00 in the first six months of 1970 over the first six months of 1969 you haven't included any tax in that?

A The taxes have been taken out of the gross receipts so that taxes are no longer a consideration.

Q In both years?

A In both years.

Q In other words, you took out from the overall gross receipts 15 per cent in 1969 and 20 per cent in 1970?

A That's correct (indicating).

Q What I am getting at, you first read their gross receipts before the tax and then you stated the tax and then you gave a net figure of their gross receipts, is that right?

A That's right.

Q I believe you also said that the number of cars -- strike that.

You were referring only to the wharf?

A That's correct.

Q Do you have any statistics on the number of cars in the

Plaintiffs' parking garages comparing 1969 and 1970?

A I do not.

Q Now, prior to your becoming City Treasurer, the parking charge at the wharf was 75 cents?

A That's correct.

Q And you thought it was way too low, didn't you?

A That's correct.

Q And so you recommended Council change it, to double it, a dollar and a half, and they did?

A That's right.

Q And the reason you thought it was too low was what?

A The city needed more money.

Q And it was too big of a barqain?

A That's correct. The lot was jam packed at eight o'clock in the morning. Since it's under my responsibility I decided to go park there one morning to see what was going on, and I couldn't get into the lot.

Q Now, it is true that the Monongahela Wharf parking is right off the Penn-Lincoln Parkway, is it not?

A That's true.

Q And you stated it was below the level of the street and that people have to walk up steps, is that right?

A That's correct.

Q Did you ever park in Mellon Square Garage?

A Yes, sir.

Q Or any of the other Parking Authority garages?

A That's correct.

Q There are steps in those garages, too, aren't there?

A There's an elevator and escalator in the Mellon Garage.

Q There are also steps?

A Yes.

Q Do you know whether people ever use those steps?

A Yes.

Q And it is a pretty good convenience to drive down the Parkway and drive right into the Monongahela Wharf, is it not?

A I think so, a number of people park there. But if you work in the center of town there are no large office buildings located along the Monongahela Wharf. You have to walk a great distance to get there.

Q But it is easier to get in and it is also easier to get out because it is along the Parkway, wouldn't you say that is some advantage?

A I would say that's an advantage.

Q You are aware of what the cost of all-day parking is with the Parking Authority, are you not?

A Roughly, yes.

Q It is about a dollar more than a dollar and a half, isn't it, and also in the private parking, you have heard yesterday the figure two thirty-five or two thirty-six for all-day parking?

A That's correct.

MR. BOEHM: That was an average rate.

MR. BOREMAN: Well, we have the rates in evidence, I think, of the Parking Authority.

BY MR. BOREMAN:

Q So that we could say that, roughly speaking, this all-day rate in your city wharf, city parking facility, is a dollar cheaper than the Public Parking Authority as well as the privately operated garage, is that right?

A It's a dollar cheaper than the nine-hour rate.

Q In the all-day rate?

A Yes.

Q And, of course, the city doesn't pay the parking tax, do they?

A No. We wouldn't tax ourselves. The entire gross receipts come to the city. It's an entire tax in that sense. The entire dollar fifty is a tax.

Q So as an economist you record that as a tax?

A It shows on the income schedule of the Treasurer's Office, and those are associated with taxes generally.

Q Does the city have any other income other than taxes?

A Very small, grants of the Federal Government or State Government.

Q Just by way of information, does the city get any revenue from water from charging residents for water bills?

A Yes, sir. The city bills all the residents of the city for the water they receive.

Q Is that a tax?

MR. BOEHM: I have no objection, Your Honor, unless -- if it is short, but if it isn't going to be short I can't see how water bills are relevant.

MR. BOREMAN: I am trying to show the city runs a business and gets income, and he calls it a tax.

BY MR. BOREMAN:

Q Are you familiar with Try Street in the City of Pittsburgh, or Second Avenue, that Try Street lot of Mr. Stabile? It is operated by Alco Parking.

A I am familiar with most of the parking facilities in downtown, but I can't picture this one. What corner is it

located on?

Q You know where that lot is generally, don't you, Second Avenue?

A Second Avenue -- What's the other intersection?

MR. McNEIL: Try Street, it's under the railroad back of the city building.

BY MR. BOREMAN:

Q Let us not waste time.

You know where Second Avenue comes into Ross Street, don't you?

A Yes, sir.

Q Right around in that area.

A Yes, sir.

Q The B & O Station.

A Right.

Q Would you say that is roughly as good a lot as the Monongahela Wharf?

A I would say it's similar. It's a little closer to the Public Safety Building and to the Grant Building which are big office buildings.

Q With respect to the general downtown area it is roughly the same, is that right?

A Yes.

Q Do you know what the all-day rate is in that lot?

A I believe it's 15 cents higher than our wharf parking. I'm not certain of that.

Q Plaintiffs' Exhibit 1 was introduced in evidence and shows it to be $1.60.

A I believe that's what your --

Q A dollar sixty.

A I believe that's true. Perhaps we should raise our rate another ten cents.

Q So roughly it is equal with your Monongahela parking?

A Yes, sir.

Q Now, Mr. Crosetti, you were speaking of the ability of the parking operators to pass on this tax in the form of a rate increase, and you discussed the economics of demand. I suppose that parking operators are subject to the same economics as other businesses, aren't they?

A Yes.

Q Do you see any difference between them and other businesses insofar as operations, that is the economics of operations?

A No. The economics would be similar.

Q That is they are different because a parking garage is different than a restaurant, let us say, but the

economics are the same.

That's correct.

In other words, you try to fix your price which will bring in the most customers and bring in the most gross receipts?

That's right.

And there is a point which you could reach if you increased the price more, you would keep away demand, is that right?

There are two points in an economic demand. At one point you would actually decrease your volume, the number of units coming in would diminish. It would not necessarily be the point at which your total gross receipts would diminish. That is a second point of demand.

Is there a second point where if you increased your prices and decreased your volume you would decrease your gross receipts, is there such a point?

Yes. You would reach a point in a demand curve where you would be losing money.

If that were to occur in the parking business and a five or a ten or a twenty per cent tax was imposed, that would mean you would be losing more money, is that right, if you reached that point, assuming you reached that point?

Assuming you were already losing money, any cost increase

would mean that you would go under and a tax would be part of that.

Q Assume your profit had reached a low level, an increase of price might throw it into the loss column, might it not?

A That would be true generally speaking.

Q Now, Mr. Corsetti, as an economist I think you can tell us this: Does it necessarily follow that if gross receipts go up income goes up?

A It doesn't necessarily follow.

MR. BOREMAN: I have no further questions.

- - -

REDIRECT EXAMINATION

BY MR. BOEHM:

Q Mr. Crosetti, just one thing I wanted to mention.

Just a couple of questions ago you said something about an increase in price throwing a business into a loss column. Would you explain what you meant by that? Does that conclusion always follow or is that conditioned on other factors?

A I think I was responding to a question by counsel who said if a business was already near the margin point or losing money, and my response was any cost increase would

push you under. A tax that was a cost increase would obviously push you under.

If they had reached that point in the demand schedule they could go no further in an increase in price?

If they had reached that point in a demand schedule.

But my earlier comments on the same question was there was no evidence presented in Exhibit 1 which had either indicated that volume itself started to fall off or that gross receipts had declined.

- - -

RECROSS-EXAMINATION

MR. BOREMAN:

Mr. Crosetti, you made no study of the financial affairs of these parking garages other than what you see in Plaintiffs' Exhibit 1, is that right?

That's correct.

So you are not in position to say whether their volume has or has not fallen off, are you?

I would say that no one in the court is in that position because no evidence has been introduced for anyone to comment on.

That is right, we don't know whether the volume has fallen

off or not, do we?

A That's right.

Q You do know that the private operators in this case have not increased their rates since the effective date of the parking tax, do you not?

A Most of the individual garages here did not post an effective increase after the last tax increase which raised a question in my mind.

Q Your answer is you know that they didn't increase their rates, is that right?

A I understand that to be from this evidence, yes, sir.

Q And that is the source of that, you don't know if otherwise, do you? Don't you know as the City Treasurer whether or not these Plaintiffs have increased their rates since the effective date of this increase in the parking tax? Do you know that or don't you?

A I think there are several in there that had a price increase since the tax went into effect, but most of them did not.

Q You haven't made a study of it, have you?

A No. The only time I learned about this is when my auditors audit the gross receipts of the garage.

MR. BOEHM: They are not required to?

THE WITNESS: They are not required to

report an increase.

MR. BOREMAN: I know that. I just want to have the record show that he either doesn't know or is aware of the fact that there has been no price increase since the effective date, and apparently he has an idea.

BY MR. BOREMAN:

Mr. Crosetti, is it part of your testimony that this increase in the parking tax for 1970 will have no effect on the net income of these Plaintiffs? Is that what you are saying?

The point of my testimony is it had no effect on their gross receipts after taxes.

It has no effect on their gross receipts after the deduction of taxes, is that what you are saying?

That's right, after the deduction of the parking tax.

How do you account for Exhibit No. 1? You say it is incorrect.

No, I totaled it up. We totaled it up with these exhibits and came to a conclusion about the total.

So this means the total receipts of all the Plaintiffs collectively, is that right?

Fifty-five, yes.

For fifty-five Plaintiffs collectively.

Those figures you used were not the figures taken from Exhibit 1, were they?

Taken from the same institutions.

You mean the same individual facilities?

Right.

MR. BOEHM: The figures Mr. Crosetti is talking about are figures obtained from his office, the Treasurer's records.

Mr. Marks wants to ask a question.

- - -

RECROSS-EXAMINATION

MR. MARKS:

With regard to your testimony, I would like you to look at Exhibit 1 in the projection for 1970 compared with the 1969 figures.

I believe you testified that there was an increase in gross revenue in that period, is that right?

(Witness nods head.)

And approximately what is that increase?

I didn't really testify to the increase in the gross

revenue but merely the increase in the reported taxes. Look at these figures because I want to test out what you have just testified about.

The increase in gross revenue is approximately what?

$48,000.00, approximately.

What is the increase in the parking tax in that period?

Parking tax increase, approximately $70,000.00. But that is a projection for the year 1970.

Based on these figures, the parking tax increase is going to wipe out any increase in projected revenue, isn't that right, and thereby the net result will be to decrease the net operating income of the facility. Is what I have said correct?

If the numbers work out as they have projected, your observations are correct. I should point out --

MR. MARKS: I have no further questions on that point.

- - -

REDIRECT EXAMINATION

BY MR. BOEHM:

Would you point out what you were going to point out, Mr. Crosetti?

With regard to projections of a type of this order I spent five years with U. S. Steel in their forecasting department, and so I consider that I have an expert testimony to present with regard to economic projections, and I spent at least five of the ten years with Jones and Laughlin in the economic research department making forecasts.

Forecasts are necessary to every business, and I don't want to depreciate it. However, the profit column in the forecast of this nature is crucial. Let me give you a couple.

A tax is 20 per cent in a projection that would be made, the tax is 20 per cent, if you would increase the -

MR. BOREMAN: The tax was 19.6 per cent.

THE WITNESS: I accept that. If you would increase by $100.00, any income increase you would automatically have to increase the tax item in the forecast. That would mean

that the managers of the business would have $80.00 with which to run the rest of the business.

And it makes the conclusion as to net profit very crucial when you itemize each of the expenses in the following. If you presume, and maybe this is a presumption you cannot make, that some of those costs are fixed in terms of other costs, then the profits increase disproportionately in any increase in projection. It would be of an advantage to show low net income by showing a low projection.

- - -

RECROSS-EXAMINATION

BY MR. BOREMAN:

And if in the projection the costs were not increased over the previous year, that wouldn't dilute the net income, would it, in a period of a rising market?

You would presume that they are fixed and consequently any increases in revenue would accrue pretty directly of profits. And you would have a very sharp increase in profits at that point in the demand curve.

Q If you didn't increase the expenses, is that right?

A That's correct.

Q So that in the projection as contained in Exhibit 1, would you say it is fair or unfair to carry over certain expenses that can't be determined at that point from the previous year at the same figure without increasing them, such as, for example, insurance payments?

A Fixed payments would be --

Q Or utilities.

A Right.

MR. BOEHM: You asked him whether it was fair or unfair. Do you mean is it accurate or will it affect the accuracy?

BY MR. BOREMAN:

Q I meant is it a fair method of making a projection.

A Yes.

Q And as an economist would you agree we are presently in a period of inflation and it is likely these expenses will rise?

A By their very nature if they are fixed they will not.

Q Those which are not particularly fixed such as, let us say, utility charges or maintenance and repair charges,

Is it likely that those expenses will rise in the period of inflation?

A Yes.

- - -

REDIRECT EXAMINATION

BY MR. BOEHM:

Q Isn't it fair, also, to assume that in a period of inflation all prices will rise including parking tax, including parking fees?

A I would think so. It's a cost.

MR. BOEHM: That is all I have.

MR. BOREMAN: No further questions.

MR. BOEHM: I have Lieutenant Jordan here now.

- - -

WILLIAM E. JORDAN, called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. BOEHM:

State your name for the record, please.

William E. Jordan.

You are a police officer with the City of Pittsburgh, obviously?

Yes.

What is your particular duty with the city as a police officer now?

At the present time I am administrative aid to Superintendent O'Connel.

Did you appear in court because of a recent request made by the City Law Department?

Yes, sir.

Could you tell the Court whether or not within the last few days you talked to Mr. Balzer who is the City Traffic Director?

Yes. This morning around 9:30 a.m. Mr. Balzer called the office and asked if I could get certain information for

him pertaining to lady guards and traffic police officers. I was able to get this information for him from our personnel and finance section.

You got it from the personnel and finance section of what?

The City of Pittsburgh Police Operations branch.

Did you relay the information you got from the personnel and finance section to Mr. Balzer?

Yes, I did.

MR. BOEHM: You may cross-examine.

MR. BOREMAN: Are you presenting him as an expert?

Your Honor, we now have testimony that he got the figures from somebody else. I thought he was the man who supplied the figures so I could cross-examine him.

THE WITNESS: I told these people that before I come up here that I got the information from someone else.

MR. BOEHM: Plaintiffs requested Lieutenant Jordan appear here. They also requested Lieutenant McMahon appear here. That's why Lieutenant Jordan is on the stand. I already mentioned we may well find out

Lieutenant Jordan may have gotten those figures from somewhere. I am sure he doesn't carry them around in his head with him.

MR. BOREMAN: The witness Balzer testified he got the figures from Lieutenant Jordan. I assumed Lieutenant Jordan had charge of the figures and could give us the information.

THE COURT: Apparently he got the figures from someone else.

Now, you want to get the someone else who produced the figures, the original party, is that what you are suggesting?

MR. BOREMAN: Your Honor, to expedite things and to see if he can give us the information, if he knows it, I am willing to go with him; but if he says he doesn't know in answer to my questions, then let us have somebody --

MR. BOEHM: He gave his information to Mr. Balzer and Mr. Balzer says it is upon that that he is reciting the figures given to him by Lieutenant Jordan.

MR. BOEHM:

Did you make a notation of the figures that you gave to Mr. Balzer?

Yes, I did.

Let me see them.

(It was handed to counsel.)

MR. BOEHM: I have here, Your Honor, the penciled notations made by Lieutenant Jordan when he obtained this information, the penciled notation made by Mr. Balzer when he obtained the information from Lieutenant Jordan and they both appear to be the same.

MR. BOREMAN: I just want the guy who can give us the information as to the figures.

MR. BOEHM:

Who did you contact, Lieutenant Jordan, to get this information, do you remember the name of the person?

A Mr. Patrick Leheny.

What is his capacity?

He just works -- he's one of the members of that division, that's all. He was able to get that information.

Do you know where he got it?

No, I don't.

MR. BOEHM: I can't see why we are making such a big issue of this, Your Honor, but I suppose ultimately we can track down somebody who can produce payroll records of all these people.

MR. BOREMAN: Let us hear it.

MR. BOEHM: You can step down.

I will put Mr. Balzer on. They are the same.

MR. BOREMAN: I want him to testify.

MR. BOEHM: I don't want him to testify, I want Mr. Balzer to testify to those figures and he is perfectly competent to do it. They are the same figures. Then we can finish Mr. Balzer's testimony and I can rest my case subject to Lieutenant McMahon coming in.

- - -

GAYLOR J. BALZER, recalled as a witness on behalf of the Defendant, having been previously duly sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Continued)

MR. BOEHM:

Mr. Balzer, I am going to ask you what the figures were that were obtained relating to the daily cost of employing the traffic policemen in the City of Pittsburgh. The total daily cost is seventy-four hundred and ninety-two dollars and some odd cents, $7492.00 in round figures. This includes lady guards, traffic policemen and anybody assigned from the Tactical Division to traffic.

MR. BOREMAN: This is only the Traffic Division?

THE WITNESS: This is the Traffic Division, lady guards and the Tactical Division which is assigned at times to traffic control.

MR. BOEHM:

Is there a breakdown of those figures there, Mr. Balzer? Yes, there is.

Q What is the cost of the lady guards? Are they indicated there?

A $3322.00.

Q $3322.00?

A That's correct.

Q Per day?

A Per day.

Q And the remainder you say is --

A Traffic Division officers directly connected with traffic, there's $3398.00, and they estimate that one-third of the Tactical Divisions work traffic and that is $772.00.

THE COURT: The grand total for all of it, I gather, is $7492.00, is that correct?

THE WITNESS: That is correct.

MR. BOEHM: You may cross-examine.

- - -

CROSS-EXAMINATION

BY MR. BOREMAN:

Q Just so I won't forget, those last figures you quoted, Mr. Balzer, that seventy-four ninety-two was for the entire Traffic Division of the City of Pittsburgh, right?

That is correct.

And that includes all traffic policemen in the City of Pittsburgh whether downtown, Oakland, East Liberty, anywhere?

That is correct.

It includes lady guards which you said is $3,322.00?

That is correct.

Can you tell us the number of traffic policemen in Pittsburgh today?

No, I can't, but I would imagine that this 116 officers with one inspector, two sergeants and two lieutenants would be the entire complement at the present time of the Traffic Division. But I'm not an authority on traffic, how many men they have.

THE COURT: He can give you the figures, but he doesn't know, that is not his department.

MR. BOREMAN:

Now, you have said you are presently the Traffic Engineer of the City of Pittsburgh. Just what does a traffic engineer do for the City of Pittsburgh? Name his duties. I think I went through this a little bit before on the last question.

MR. BOEHM: I object to it as repetitious.

MR. BOREMAN: It is cross-examination, Your Honor. I am not clear.

THE WITNESS: He regulates the flow of traffic, tries to expedite the flow of traffic safely on the streets with the use of signs, signals and markings and starts and institutes any study which is necessary to complete the information necessary.

BY MR. BOREMAN:

Q Well, when you say regulates the signs of the city, you don't place the signs -- you are in a position of directing how the signs should be placed on the streets, stop signs and red lights, and so forth, is that right?

A I do not do the work directly. I supervise it.

Q You supervise it, of course. And you are constantly studying the traffic situation in Pittsburgh to better it, is that right?

A That is correct.

Q And you are interested in how traffic can move smoothly?

A That is correct.

Q And to relieve congestion, are you not?

A That is correct.

And that is the general purpose of your department, to try to find better ways of moving traffic, is that right?

Yes, that is right.

For instance, we know that there is quite a bit of congestion down at Stanwix and Liberty because they are tearing up the streets today. You try to find ways of relieving that congestion, do you not?

Right. We try to find out where to place adequate warning signs and give adequate notice to the public ahead of time that something is occurring.

And you studied the various traffic patterns in the city so you might find ways to improve them, is that right?

That's right.

And if new streets or parkways are being built you study that to find the best way of moving the traffic along those through streets or parkways with respect to having little or no congestion?

That is correct.

Now, how much time during any particular month would you say you devote to studying parking garages?

Very little time is devoted to the study of parking garages or lots. In the overall looking at traffic situations in the downtown area if a trouble shows up or as congestion shows up at a particular location, then we

try to pin the problem down as to what is causing that particular --

Q There are times when congestion might occur in a parking garage or lot, is that right?

A Correct.

Q And there are also times when congestion might occur down in front of, let us say, one of the department stores, Kaufmann's or Horne's, is that right?

A That is right.

Q Or in front of a theater or a restaurant. I mean, there are various causes and reasons at a particular time that some unusual congestion will occur, is that right?

A That's correct.

Q Now, you said you observed the peak hours of traffic which you said were between the hours of 7:00 and 9:00 and 4:00 and 6:00.

A That's correct.

Q That is when most people are either coming in the city or leaving the city, is that right?

A That's right.

Q What streets in downtown Pittsburgh would you say have the most congestion?

A Liberty Avenue, Grant Street, Smithfield Street, Wood Street, Fifth Avenue, Sixth Avenue.

Q Would you say that Fifth and Smithfield is a congested area of downtown during the hours of 7:00 and 9:00 and 4:00 and 6:00?

A Fifth and Smithfield is a high congested area mainly due to the fact that there are so many pedestrians that cross it.

Q Isn't that the case with respect to Forbes Avenue and Smithfield, too? Isn't that the same thing with respect to Forbes Avenue and Smithfield, a lot of pedestrians crossing?

A At Forbes and Smithfield we have "Walk" lights, and that is one -- another reason for traffic congestion is the pedestrians.

Q Usually there are traffic patrolmen stationed at those corners, are there not?

A I couldn't tell you if there's one stationed all the time at Forbes at Smithfield. I know there is one usually stationed at Fifth and Smithfield.

Q How about Fifth and Grant? That is a pretty congested area, isn't it?

A Fifth and Grant is a congested area.

Q And usually a patrolman is stationed there?

A Usually at normal times there is a traffic man there.

Q And at Fifth and Smithfield is where Kaufmann's Department Store is located, is it not?

A That is correct.

Q And the Mellon Bank?

A Right.

Q And the other corner has Western Pennsylvania Bank, is that right?

A I think it is. I'm not positive what's on the other corner.

Q Would you say that people going in and out of these buildings and cars stopping and picking up people contribute to the congestion of those buildings?

A Definitely. Any stoppage of traffic or stopping of an automobile on the streets contributes to congestion.

Q Both automobiles and pedestrians?

A Right.

Q Would you say that the busses contribute to congestion?

A Any moving vehicle on the street contributes to congestion.

Q Actually, your chief concern about the movement of traffic and congestion relates to the streets of Pittsburgh, is that right?

A That is correct.

Q Now, isn't it a fact that if you can get the cars off the

streets, that would relieve congestion?

A If we could keep them from coming into the downtown area it would relieve congestion, yes.

Q That isn't my question.

If cars come into the downtown area and you can get them off the streets, to that extent it relieves congestion, does it not?

MR. BOEHM: The question can't be answered. You can't get a car into the downtown area without having it on the street. I object to the form of the question.

MR. BOREMAN: He is an expert, Your Honor, and I am asking him whether getting the cars off the downtown streets relieves congestion.

MR. BOEHM: You mean if they could fly in and be dropped into a downtown garage?

THE COURT: Your objection is overruled. The question is appropriate.

Answer it if you can.

(EXCEPTION NOTED)

THE WITNESS: What was the question again?

BY MR. BOREMAN:

Q The question is to the extent that you can get automobiles that come into downtown off the street, that relieves congestion, doesn't it?

A Yes, it does relieve congestion.

Q You are familiar with the Public Parking Authority, aren't you?

A Yes, I am.

Q And you know that those garages were built for a specific purpose to get automobiles off the streets, do you not?

A Yes.

Q And the Public Parking Authority has now built garages in the downtown area which park automobiles coming into the downtown area, do they not?

A Yes, they do.

Q And to the extent that they go to the Parking Authority garages, they relieve downtown congestion, do they not?

A If they are on the road to the parking garage they add to the congestion. Once they reach the garage, then they are not part -- and enter the garage they are not part of the congestion.

Q If there were no Parking Authority garages, there would be more congestion on the streets of Pittsburgh, wouldn't

there?

A Or if there were no garages, possibly there would not be as many cars for the fact they couldn't bring them downtown if they don't have a place to park.

Q As Traffic Engineer of Pittsburgh do you advocate we remove all parking garages from the downtown area in Pittsburgh?

A No, I don't.

Q Then, is it your testimony that the parking garages do not relieve congestion?

MR. BOEHM: The witness has already answered the question, Your Honor, exactly the same question.

MR. BOREMAN: I want to hear a statement from him whether the parking garages do not relieve congestion.

MR. BOEHM: It was answered "Yes" before. I assume he won't change his answer. I object to the question.

THE COURT: We will overrule the objection. Answer the question.

(EXCEPTION NOTED)

THE WITNESS: Parking garages both add to the congestion for cars going to the garage

and relieve the congestion once the cars are in the garage.

BY MR. BOREMAN:

Q When you say they add to the congestion going into the garage, you mean by reason of the fact cars are on the street going into a parking garage?

A Any car destined to a parking garage is destined to a generator which in a sense puts another car on the street from one location to another.

MR. BOREMAN: Let me see if I get that. Could I have that answer read?

(The answer was read.)

BY MR. BOREMAN:

Q If a car was driving from Fifth and Grant down to Fifth and Liberty, that would be part of the traffic congestion, wouldn't it?

A That is correct. Any time a car is moving over a public street it's part of the congestion.

Q You are aware of the Wilbur Smith report, aren't you?

A I am aware of the report. I have not read it thoroughly.

Q You testified that from the Wilbur Smith report we need about 4700 more parking spaces in Pittsburgh.

A This is what the Wilbur Smith report --

Q Would you agree with that conclusion?

A Yes. I believe we need more parking spaces in the downtown area of the City of Pittsburgh.

Q Either in Public Parking Authority garages or in private garages or lots, is that right?

A Yes, in some manner, shape or form. However, to clarify this I think the need possibly is on the periphery rather than in the downtown core.

Q You would rather see the parking garages on the periphery?

A Any new ones built, yes.

Q Mr. Balzer, what do you think will happen to congestion and traffic in the city if we don't get those 4700 new spaces?

A If we don't get the 4700 new spaces there will be a lack of -- actually right now there is a deficiency of 4700 spaces as of '69. The lots are filling up and the cars are going elsewhere, whether they go to the North Side or whether they don't use their automobiles to come in to town, the ones that would if there was sufficient spaces.

Q Do you think that if we don't get those 4700 spaces congestion will be increased or decreased? As a traffic engineer, what do you think?

A As a traffic engineer, if we don't get the extra 4700 spaces, depending upon what else happens in the City of Pittsburgh, I would say we would possibly get a decrease in automobiles and some other type of transportation.

Q You think if we don't get these spaces automobiles just won't come to town, is that right?

A They may double up as car pools or they may ride mass transit or they may park in other areas on the periphery and take mass transit into downtown. If there are no spaces available there is no reason for them to come down here to try to get a space.

Q But you don't think it will add to congestion if we don't get these spaces? Is that your testimony?

A I can't see where it is going to add to congestion if we don't have the cars down in the downtown area.

Q I am referring to Wilbur Smith's conclusion that you adopted that we need, you said, 4700 more spaces in the central business district. That is what he said and you said you agreed to it.

My question to you is, if we don't get it will it or will it not add to congestion in street parking?

MR. BOEHM: Excuse me, before you answer that.

I think, Your Honor, that Wilbur Smith's words were "A demand for that many spaces." But in questioning Mr. McNeil he qualified it by saying "Need."

THE COURT: This is a matter of semantics, I take it. There is a demand for them and we need them and if we don't get them, what is the answer. Give us the works here.

THE WITNESS: All right. If we don't get them in the downtown area, and I haven't read the study far enough to find out whether they even make the stipulation that they -- I don't know whether the stipulation is that these downtown spaces be placed in the downtown core or whether they be placed on the periphery of downtown. I haven't read that report to its conclusion to find out what was stipulated in the report.

If the report is what I would presume it to be, they are asking possibly that the downtown -- that the 4700 deficiencies be built somewhere in the periphery and, therefore, you are going to relieve some of the deficiency

in the downtown area.

BY MR. BOREMAN:

Q You really don't know because you haven't studied that report?

A That's what I am trying to say. I haven't looked at that report to find out.

Q You are certainly in favor of anything that takes parking off the streets, aren't you?

A I am certainly in favor of that, yes.

Q And you are familiar with why the Public Parking Authority was created, I take it?

A Yes.

Q It was created to take parking off the streets, was it not

A Right, to build public parking lots so that the expense could be taken care of and the public spaces be available.

Q Are you aware of any new proposed parking garages that the Public Parking Authority is considering?

A I am aware that they are considering a proposal for a certain area, yes.

Q I didn't hear your answer very clearly.

A I am aware of a proposal for a parking lot in a certain location, yes.

Q Are you on a committee that is studying that?

A I am now. I wasn't before, is what I am saying. I don't have the facts to say -- to tell you that they are or not.

Q What committee is that?

A The Public Parking Authority Technical Coordinating Committee, and I wasn't on that committee when these studies were made. Mr. Wozniak has gotten together with me since I was appointed Traffic Engineer to go over just exactly what their plans are for the overall picture of the downtown area and the surrounding areas of the City of Pittsburgh which he had promised to do in the near future.

Q Are you familiar enough with the Parking Authority operations to tell us if they are operating at capacity or near capacity?

A No. I don't know whether they are operating at capacity or not, as a fact.

Q You made the statement that 50 per cent of the downtown area is composed of streets and parking lots?

A Right.

Q Can you break that down and tell us how much of that is devoted to streets and how much to parking lots?

A At the present time I couldn't.

Q You couldn't do that?

A No.

Q When you say streets, you mean all the streets in the downtown area?

A All the streets in the downtown area plus the parking lots.

Q Now, you weren't a member of the Traffic Planning Committee at the time that Kaufmann's Garage was built, were you?

A No, I was not.

Q Are you aware that Kaufmann's Garage was built by the Public Parking Authority?

A No, I was not.

Q You know now that it is a Public Parking Authority garage, do you not, or don't you know that?

A I don't know who owns the garage.

Q You don't know who owns the garage.

Do you know that it is located on what is now known as Cherry Way?

A Yes, I know that.

Q Do you know that it was once referred to as Cherry Alley, but its name was changed?

A That was before my time.

Q Mine, too.

So that Kaufmann's Garage built by the Public Parking Authority was built with an entrance on Cherry Way or Cherry Alley.

If you were planning a garage today would you build a garage opening on an alley in downtown Pittsburgh?

A You are trying a leading question. Depending upon circumstances as to what occurs in that alley and the exists and entrances to that alley. Possibly, yes. Again, possibly, no. It all depends upon circumstances as they exist.

Q Can you think of any alley or way in downtown Pittsburgh which might be suitable for an entrance to a parking garage?

A At the present time, no.

Q I show you your Defendant's Exhibit B in which is a view of the entrance to Kaufmann's Parking Garage on Cherry Way and ask you which way that sign that says "Sorry, filled up" is pointing? Is that inside or out?

A Inside.

Q I ask you whether on that exhibit you see any cars that are actually entering the garage?

A No.

Q So for all you know the cars on that street might be continuing past the garage? It is possible, isn't it?

A From the picture it's possible that this could be happening.

Q You weren't there when the picture was taken, were you?

A No, I was not there.

Q I will show you Defendant's Exhibit D being a picture of the entrance to Kaufmann's Parking Garage and ask you how many cars are on the street in that picture?

A No cars on the street in that picture.

Q Now, you say this picture was taken for the purpose of making a study of parking garages, is that right, and their effect on traffic?

A To try to clear up any congestion in some way or another that had occurred due to backup from the parking --

Q Before you made the study, how did you know there is backup --

A I rode the streets, walked the streets at the peak periods and seen where the backup was occurring, and not only the peak periods but in the off-peak periods.

Q This picture, Exhibit D, was taken on August -- at 10:45, August something.

Is there any backup in that picture?

A No, there is not.

Q You say you walked the streets and that is where you saw backup?

A That is correct.

And you have been in the Traffic Division since 1954?

Yes.

And you started to make this study when?

I started this study in August.

August of 1969. So --

MR. BOEHM: '70.

THE WITNESS: 1970.

BY MR. BOREMAN:

So from the time you commenced work with the Traffic Division in August of '54 until August, 1970 you made no study of parking garages and what you allege is backup?

I made no study of it nor did I assign anybody to it because Mr. Miscimarra was in charge of it at that time and he made the decision as to what could be done and would be done.

And these are the only pictures, then, of any parking garage that you took?

This is the initial start. We just started in August 23 or 24, and these men are doing this to supplement their regular work, and their regular work takes precedence over this study.

This is not a formal part of the duties of the Traffic

Division, it is just sort of a side duty, is that right?

A It is a part of the traffic planning to look at any congested area to see if the conditions --

Q I understand that, but I asked you the question, you said their regular work takes precedence.

What do you mean by that?

A These men are investigators on the installation of parking meters, they are draftsmen, they make other studies, and when they don't have work that is pressing they will put their time and devote their time to this type of work.

Q In other words, this is a secondary-type of project, is that right?

A It has to be.

Q Why does it have to be?

A Because this is something that we know has to have a thorough study made of it. We can't devote our entire forces to it. Therefore, it must have to be done on a piecemeal basis.

However, the rule to which we want to attain is still the same, to eliminate possibilities like this if it is possible.

Q And you have already come to the conclusion in deciding to make this study that parking garages do cause congestion,

is that your conclusion?

A Parking garages do cause congestion periodically through the day, yes.

Q And that is based on your observation from walking streets?

A Walking the streets, driving in the streets and standing and looking at the situation and what has caused the backup

Q Will you name us another occasion in which you saw backup in a parking garage? Name us the date and time, what parking garages and what date and what time did you see backup?

A I don't have dates and times. I did this over a period of time on an observation where I would come down early and ride the streets to see what -- where a backup was at, what was causing it, and things like that. I didn't make notes as to time and date. I knew that I could see that the traffic was backing up from the parking lots. As far as notes and records are concerned, no.

Q Can't you name us one place within the last month that you saw backup?

A On a specific time you asked for?

Q Yes.

A No, I can't give you specific times where I've seen backups. I've seen backups at parking garages at different times of

the day at Fort Duquesne and Stanwix, at Cherry and Forbes. I've seen backups, yes, but I didn't authenticate it by putting a date and time on it. I wasn't interested at that time in the date and the time.

Q You don't have that.

Mr. Balzer, I am going to show you Exhibit No. 11 which is the parking study of Wilbur Smith for the Pittsburgh Parking Authority, and I am going to ask you to read the first full paragraph on Page 30 of that study.

Would you read it, please?

A "Parking spaces, parking space surplus and deficiencies were determined by relating the adjusted supply to the existing parking demands, thus an overall deficiency of 4120 spaces was established. The highest surpluses were in those blocks containing major parking facilities while the greatest deficiencies are in those blocks containing such generators as Gateway Center, Horne's, Gimbels and Kaufmann's department stores, Federal Building, Post Office and the Mellon-U. S. Steel Building."

Is that enough?

Q Now, would you agree with that statement?

A As to Gateway Center, yes, Horne's, Gimbels, Kaufmann's, Federal Building, Post Office, Mellon-U. S. Steel Building.

Q Would you say those places are major generators of traffic congestion?

MR. BOEHM: Major generators of what?

BY MR. BOREMAN:

Q Traffic congestion.

A They are major generators of vehicles to the area for the purpose of shopping or work, whatever is necessary.

Q That 1963 study that was introduced into evidence, what is the number of that exhibit -- Defendant's Exhibit H.

Do you know whether that study shows traffic congestion situations in the City of Pittsburgh?

A It's been a long time since I looked at that study.

Q You don't know?

A Right offhand I don't know. I think it does show a buildup of automobiles in the downtown area where you reach the maximum and then the curve drops off again.

Q That is your notion of what it says, but you are not sure, is that right, or one of the subjects it deals with?

A I know there is a report on that. It's a graft on the accumulation of the automobiles in the downtown --

MR. BOEHM: It is in evidence, it will speak for itself.

MR. BOREMAN: I want to know what he knows.

BY MR. BOREMAN:

Q Do you know whether it discusses anything about parking garages and their relationship to congestion?

A As I said, I haven't looked at that report for years.

Q You don't know, then?

A No.

MR. BOREMAN: That is all I have, Your Honor.

(Recess taken.)

- - -

REDIRECT EXAMINATION

BY MR. BOEHM:

Q Mr. Balzer, Mr. Boreman asked you a question toward the end of his cross-examination with respect to Mr. Smith's report describing department stores, et cetera, as major generators of traffic and you say you would agree with th

A Yes. A department store or any other big office building is a major generator of pedestrians and vehicles.

Q It is a generator of both pedestrian and vehicular traffic

A Right. It adds to the congestion, depending upon the mode they come into the city with, whether they come in on mass transit, then they become pedestrians.

Q Would that department store or other service, whatever it is, be a vehicular generator if there weren't adequate off-street parking on which to place that vehicle while the person was making use of that service?

A It could in some ways, yes, if you drop off a husband or the wife, and things like that.

Q Is there a relationship at all to the generation that the store produces and vehicular generation and the parking spaces available to service that automobile?

A Would you ask that question again?

Q Is there any relationship between the amount of automobile traffic produced downtown and the parking spaces available to handle that traffic?

MR. BOREMAN: I will object to that, Your Honor, unless he predicates it by showing that he has made a real serious study on that, just not an offhand thought.

THE COURT: We will sustain your objection.

Proceed.

(EXCEPTION NOTED)

BY MR. BOEHM:

Q Mr. Balzer, do you know what time the department stores open downtown?

A Yes.

Q What time?

A They open at ten o'clock and twelve o'clock noon.

Q What time do they open in the morning?

A Ten o'clock.

Q Every day?

A Mondays and Thursdays I think they open at noon.

MR. BOEHM: That is all I have.

MR. BOREMAN: No further questions.

MR. BOEHM: I have Lieutenant McGahon here, Judge, so I think we can finish this afternoon. He came in in spite of a flat tire.

THE COURT: It is no longer this afternoon, it is this evening.

- - -

JOHN F. McMAHON, called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BOEHM:

Q You are a police lieutenant for the City of Pittsburgh, is that right, sir?

A Yes, sir.

Q Are you assigned to the Traffic Division?

A Yes, sir.

Q Are you in charge of one particular phase of the Traffic Division?

A The daylight turn traffic, that would be from 7:00 to 3:00 daily.

Q Did you recently have a telephone call from Mr. Balzer with respect to policemen stationed at garages?

A Yes, sir.

Q Let me show you what has been marked as Defendant's Exhibit G and ask you if that is the report you submitted to him?

A Yes, sir.

Q Is that your signature?

A That's right.

Q Now, where did you get the information that you placed in this report?

A From my experience in the streets.

Q In other words, you didn't check any particular records, right?

A No, sir. No, sir.

Q You knew this of your own personal knowledge?

A Yes, sir.

Q And you are in charge of the men that are placed at these various intersections during the day, is that right?

A Yes, sir.

Q Now, does this report contain all of the locations where policemen are stationed at garages in the City of Pittsburgh or lots in the City of Pittsburgh?

A See, that report is not a constant eight-hour day in the garages. That is a period of time where when there might a tieup at a garage, garage entrance, we have a man go the

Q Do you have a man at each of these locations for some period --

How often do you have a man in each of these locations

A Well, just from memory, Kaufmann's Garage there at Cherry and Forbes Avenue, that's a constant detail. At Fourth

Avenue and Stanwix Street, that's a constant detail. We must have a man down there. If we don't, you have utter chaos. Ninth and Liberty, there's an entrance there where the old Seventh Avenue Hotel is, the motorists will come up Ninth Street towards the parking lot and if they can't get in they stop, so you have your normal flow of traffic on Liberty Avenue also stopped. Now, if we have a man there we can alleviate that.

Q That is the purpose of the man being there?

A That's right. Yes, sir.

Q Now, are there any men stationed at locations in addition to the ones that you have given to Mr. Balzer here as you say from memory, possibly?

A Well, Mr. Balzer asked me during the day -- you know, we also have the Civic Arena, we must put men up there. Now, here I see (indicating) Sixth and Bigelow. There is not a man there constantly. We take the man from the corner and move him up there.

Q Move him up where?

A Move him up to the garage entrance. We have to do that because when the garage entrance is tied up it will be a short while and the intersection will be tied up so that's the reason for that. Sixth and Fort Duquesne, there's the same answer there. Third and Grant, same reason, Sixth

and Penn. Cherry and Boulevard of the Allies, we must have a man there every evening. If we don't the Boulevard of the Allies is tied up.

Q Now, do you have a man at Cherry Way and Forbes?

A Not constantly, but a good bit of the time we do. It all depends upon the traffic pattern that day.

Q Is there a man at Forbes and Smithfield?

A Forbes and Smithfield --

Q And why is it that you have a reason for a man not being stationed at Forbes and Smithfield, is that what you said, that is one of the largest intersections in the city?

A Well, you must realize Forbes and Smithfield is two one-way streets. Now, up above at the parking lot it's more important to have a man up there because that's where you are going to have your tieup, and that's the reason the man is out there.

MR. BOEHM: I offer in evidence Exhibit G.

MR. BOREMAN: That is objected to, Your Honor, until I have an opportunity to cross-examine.

THE COURT: All right. We will defer our ruling until you have an opportunity to cross-examine.

CROSS-EXAMINATION

BY MR. DOREMAN:

Q As I understand it, Lieutenant, you are in charge of assigning traffic policemen during the hours you are on duty?

A Yes, sir.

Q How many traffic policemen are there in the City of Pittsburgh altogether?

A You mean actually working at it or assigned to traffic?

Q Actually working at traffic, corner men.

A Corner men -- we have approximately -- I must qualify this because there are times we must take our motorcycle men off of motorcycles and put them on corners due to traffic problems. We have a daylight -- I could say about seven-thirty we have about 19 corner men.

Q Nineteen corner men in the City of Pittsburgh or just downtown?

A We don't have any placed downtown. There's 19 corner men, that is if they are all on, nobody is sick. Then at ten-thirty Monday through Friday we have a complement of ten or more who come out and work until six-thirty in the evening.

Q Why do you increase that?

A Well, the ten-thirty to six-thirty turn, that helps out the peak period of four to six in the evening.

Q At various corners in the downtown area?

A Yes, sir. They move around.

Q So the regular complement is 19 and at various peak periods there are ten more?

A There's ten more at ten-thirty, actually. Ten more additional come out Monday through Friday.

Q And do they work from ten-thirty till when?

A Six-thirty.

Q They stay on the corners?

A They stay on their same corners, yes, sir, or they may - when a man is assigned to a corner he may have an area of the street where there's parking where he must go up then and either give them a tag or move the fellow.

Q When you talk about assigning these men at corners, their specific station is the corner but they might move over to the entrance of the parking garage on occasion, is that right, when it is needed?

A They would have to as needed, that's right.

Q But their station is the corner, isn't that right, their station isn't the entrance to the parking garage?

A Well, many times we station Smitty at that parking garage

at Cherry and -- at Kaufmann's on Cherry Way.

Q When cars are coming in and out?

A Yes, sir.

Q But that isn't his sole and specific duty as a traffic policeman, is it? I mean, he goes --

A If you are going to make it like that, I'll tell you, the sole and specific duty of the traffic officer is the protection and lives and property of the citizens of Pittsburgh.

Q With respect to traffic his duty is to move traffic, is that correct?

A That's correct.

Q And avoid congestion?

A That's right.

Q And that means whether it is at the entrance of a parking garage or at the corner or anywhere else in the street, is that right?

A That's right.

Q In other words, if a car is stopped at a place and there was a "No Stopping" sign in front of a department store or restaurant, or parked there, the traffic policeman would go over there and get him to move or give him a ticket?

A Correct.

Q You might have your people even tow him away, isn't that right?

A That's right.

Q Down at McCann's there, that man down there, I think you said, at Liberty and Stanwix, he is stationed at the corner?

A Did I say McCann?

MR. BOEHM: Are you dating yourself again?

MR. BOREMAN: Were we talking about Forbes and Stanwix?

BY MR. BOREMAN:

Q His official station, is it the corner or is it the entrance to the garage?

A Well, I'll tell you, the corner and the entrance to the garage are almost the same.

Q In other words, they are all part of the duties?

A If that man isn't there them people coming in and out of that garage, you have a traffic problem.

Q There isn't a traffic tieup the entire day in front of the garage, is there, it is only at certain times?

A Well, that would be only normal when it's busy, when they

are going in or out.

Q At that corner there, Fourth and Stanwix, if there were no garage would you still have a traffic patrolman there or not?

A Today I hardly doubt it because we don't have the traffic man.

Q You say going along Stanwix at the intersection of Fourth you wouldn't need a traffic man there?

A Without the garage there I honestly don't think so because you know that is a one-way street there.

Q That is because it is a one-way street.

And how about at the corner of Fort Duquesne Boulevard and Stanwix?

A Where?

Q Fort Duquesne Boulevard and Stanwix. Isn't that man, the corner man, at that corner?

A Yes, sir.

Q Are you saying if there was no garage there you wouldn't have a corner man there, or would you?

A I imagine we wouldn't have a man there.

Q You mean at the peak hours from four to six or seven to nine in the morning you wouldn't have a corner man at the intersection of Fort Duquesne Boulevard and Stanwix Street?

A It's highly possible. You must understand, these policemen lay off sick occasionally and there's only so many ounces of milk in a quart. You use what you have to your best advantage.

Q Are you saying if there were no traffic garages there wouldn't be any traffic policemen downtown?

A I hope I didn't give that illusion to anybody here today. I don't think there is anybody out there that thinks that.

Q We would have to have traffic policemen downtown whether there were parking garages or not, is that right?

A We don't have enough traffic policemen.

Q Exactly.

How about at the corner of Fifth and Grant, do we need a traffic policeman there?

A Fifth and Grant, I'm going to cite you a story about Fifth and Grant. You asked me a question, I'm going to give you an honest answer. I'm on a trolley car one night making my rounds on the streetcar and the streetcar man says to me, he says, "Whenever that policeman is not there this is one hell of a corner."

Q He means it is pretty bad?

A You need a man there.

Q You bet you do, at Fifth and Grant.

We don't always have them there.

There is no parking garage on the corner of Fifth and Grant, is there?

No, sir.

Can you tell me whether you know or not, Lieutenant, has the number of traffic patrolmen downtown been reduced in the last eight or nine years?

Yes.

It has been reduced?

Yes.

How about around theaters and hotels; we need traffic people there, too, don't we?

Yes, sir.

Let us take the Hilton, you need traffic patrolmen around there, don't you?

We don't have a traffic patrolman assigned down there.

But he has to go down there sometimes and clear up congestion, does he not?

It all depends upon if there is a guest in Pittsburgh -- if there is a big banquet at the Hilton where there is a great attendance, we have to have something down there to even help the people cross the street. You know, we not only control automobiles, we control pedestrian traffic.

Q That is why you need traffic men?

A We need more of them.

Q You bet.

Now, at Sixth and Penn or Sixth and Liberty, I thi
there is a traffic corner man there, is there not, at
Sixth and Liberty?

A Not constantly.

Q I am talking about the peak hours.

A Well, now, you are talking about peak hours. You talk
about ball game traffic, also, coming across that Sixth
Street Bridge, if you don't have a man there you are lo

Q And in peak hours you would have to have a man there, t
wouldn't you?

A If we had the men we would put them there. We don't
always have them.

Q In other words, when you don't have them on corners yo
just don't have enough men?

A That's right.

Q You need more men, don't you?

A Yes, sir.

Q And if they are not there it is because you don't have
them, is that right?

A That's right. That's the correct answer.

Lieutenant, I have just one more question.

These locations that you mentioned on this notice like Ninth and Liberty, Fourth and Stanwix, Sixth and Bigelow, Cherry and Boulevard of the Allies, particularly Boulevard of the Allies, Sixth and Fort Duquesne Boulevard, Fourth and Ross, Third and Grant, Sixth and Penn, and these other lots, Eleventh and Liberty, Market and Fort Pitt Boulevard, Forbes below Smithfield, Third and Market, Marketplace and Forbes Street, these streets are all that you have mentioned here, they are actually what should be and ought to be termed main arteries in downtown Pittsburgh, aren't they, most of them at least?

Yes. We couldn't do without any of them. If we just did away with Oliver Avenue, see what it would cost us.

MR. BOREMAN: I have no further questions, but I object to introducing this into evidence because I don't think it is a correct statement of his testimony.

MR. BOEHM: We will withdraw Exhibit G. I won't offer it.

- - -

REDIRECT EXAMINATION

BY MR. BOEHM:

Q Lieutenant McMahon, you do as you have testified have policemen at some time during the day Monday through Friday at the various locations read off by Mr. Boreman?

A Yes, sir.

Q Can you tell the Court why it is that the number of traffic patrolmen have been reduced in the City of Pittsburgh?

A You better ask somebody higher than a lieutenant.

THE COURT: You are placing the officer in a difficult position here.

MR. BOEHM: I want him to be honest.

THE WITNESS: I am honest, and I know when to keep my mouth shut.

BY MR. BOEHM:

Q Tell me why --

A I am not going to give you an answer one way or another because it was not my decision to make the cut. You have to ask somebody higher in authority than me.

Q Is it because you can't get the men?

MR. BOREMAN: Objection, Your Honor. It

has answered the question.

THE WITNESS: I am the one that's always hollering for more men. We never have enough men, but this has been public knowledge, this has been published in the paper that the Traffic Division has been cut down. Don't ask me why, ask my superiors.

MR. BOREMAN: Let me ask you this question.

MR. BOEHM: I think it is my turn, isn't it?

MR. BOREMAN: I thought you were through. I am sorry.

BY MR. BOEHM:

Q Are you saying you don't know but your superiors might?

A Why, certainly they would. They made the decisions, I didn't.

Q If you don't know, you can't help us out. And you have cited specific instances to Mr. Boreman where patrolmen actually for some time during the day have to alleviate traffic congestion at a parking garage, is that right?

A That's correct.

Q Is that true of all the places that are listed on this

(indicating) sheet?

A At some period during the week or possibly during the day we have got to delegate police officers to those places I put on that sheet of paper.

Q That didn't really answer my question.

You mean to those garages, the captioned garages, is that what you mean?

A Those are garages and the other ones are lots, that's right. And some of them we don't have to have a man there -- That one at Eleventh and Penn -- but you have to send a man there every once in a while because people are waiting to get in that parking lot and there's no more spaces and they sit there and will not move until we send a policeman down and say move. I have stood and directed traffic myself as a lieutenant at Ninth and Liberty.

Q Let me ask you one more question.

Do you have jurisdiction over anything except the downtown area?

A Anything that happens within the scope of traffic, fires or things like that.

Q What is the boundary limitation of your jurisdiction, does it extend, for example, to East Liberty and Oakland?

A The City of Pittsburgh is my boundaries of jurisdiction.

trafficwise.

Just limited to traffic in the entire city, East Liberty, Oakland, et cetera, is that right?

That's right.

- - -

RECROSS-EXAMINATION

MR. BOREMAN:

When you say you send a man, you mean you tell the corner man to go over and break up that waiting line?

Yes, and many times I don't have to tell that man. He knows it himself that whenever that's blocked up he will go over on his own.

As a matter of fact, any place in the city if it is blocked up and people are holding up traffic, you would expect a traffic man to go over and break it up, wouldn't you?

Certainly.

MR. BOEHM: The City rests.

MR. BOREMAN: Thank you, Lieutenant.

If Your Honor please, I just want to ask Your Honor before we adjourn, that exhibit, Plaintiffs' Exhibit 1, containing figures, and so forth, would Your Honor consider

impounding that so it doesn't become a matter of public scrutiny. Counsel has a copy and so does Your Honor, but after the case is over we would like to take it out of the record because we certainly would like to prevent the general public and competitors and everybody else from looking at it. So I make that request of Your Honor.

THE COURT: That has been entered as an exhibit, and when we finish the case you can have your exhibits back.

MR. BOREMAN: At the end of the case?

THE COURT: Yes. That is the usual procedure, and we will try to keep it under wraps while we are giving it serious consideration.

Now, you have rested. Is there any rebuttal testimony?

MR. BOREMAN: No, no rebuttal testimony.

THE COURT: Do you want to submit another brief other than the memoranda brief?

MR. BOREMAN: I think we will want to submit a brief on the testimony, possibly

some suggested findings of fact that might be of help to Your Honor.

THE COURT: I am sure that it would. If you request findings of fact we will permit you that, but I don't want any delays on you getting your brief in. I don't want to have a brief six months from now.

(Whereupon, the hearing was concluded.)

- - -

C E R T I F I C A T I O N

- - -

I, Thomas A. Mustachio, hereby certify that as Official Reporter I took the stenographic notes of testimony at the aforementioned proceedings and the foregoing pages contain a full, true, complete and accurate transcript of all my said notes.

Official Reporter.

- - -

Plaintiffs' Exhibit No. 1

DATA PERTAINING TO THE PARKING OPERATIONS OF THE PLAINTIFFS IN THE PITTSBURGH PARKING TAX CASE

DONALD N. McNEIL
CONSULTANT ENGINEER
1120 INVESTMENT BUILDING
PITTSBURGH, PENNSYLVANIA 15222

SEPTEMBER 1970

TABLE OF CONTENTS

ALCO PARKING CORPORATION

Summary of 1968, 1969 and Projected 1970 Income & Operating cost by individual Facility.

Detailed Operating Statement for each Facility for 1968, 1969 and Projected 1970.

Parking rates presently in effect at each Facility.

WILLIAM PENN PARKING LOTS

Summary of 1968, 1969 and Projected 1970 Income & Operating cost by individual Facility.

Detailed Operating Statement for each Facility for 1968, 1969 and Projected 1970.

Parking rates presently in effect at each Facility.

PARKING SERVICE CORPORATION

Summary of 1968, 1969 and Projected 1970 Income & Operating cost by individual Facility.

Detailed Operating Statement for each Facility for 1968, 1969 and Projected 1970.

Parking rates presently in effect at each Facility.

ARENA PARKING, INC.

Summary of 1968, 1969 and Projected 1970 Income & Operating cost by individual Facility.

Detailed Operating Statement for each Facility for 1968, 1969 and Projected 1970.

Parking rates presently in effect at each Facility.

FOURTH AVENUE PARKING, INC.

Summary of 1968, 1969 and Projected 1970 Income & Operating cost by individual Facility.

Detailed Operating Statement for each Facility for 1968, 1969 and Projected 1970.

Parking rates presently in effect at each Facility.

Plaintiffs' Exhibit No. 1

TABLE OF CONTENTS - Contd.

WILLIAM PENN PARKING GARAGE, INC.

Summary of 1968, 1969 and Projected 1970 Income & Operating cost by individual Facility.

Detailed Operating Statement for each Facility for 1968, 1969 and Projected 1970.

Parking rates presently in effect at each Facility.

CAMPUS PARKING, INC.

Summary of 1968, 1969 and Projected 1970 Income & Operating cost by individual Facility.

Detailed Operating Statement for each Facility for 1968, 1969 and Projected 1970.

Parking rates presently in effect at each Facility.

GRANT PARKING, INC.

Summary of 1968, 1969 and Projected 1970 Income & Operating cost by individual Facility.

Detailed Operating Statement for each Facility for 1968, 1969 and Projected 1970.

Parking rates presently in effect at each Facility.

STANWIX AUTOPARK

Summary of 1968, 1969 and Projected 1970 Income & Operating cost by individual Facility.

Detailed Operating Statement for each Facility for 1966, 1969 and Projected 1970.

Parking rates presently in effect at each Facility.

LIBERTY PARKING

Summary of 1968, 1969 and Projected 1970 Income & Operating cost by individual Facility.

Detailed Operating Statement for each Facility for 1968, 1969 and Projected 1970.

Parking rates presently in effect at each Facility.

TABLE OF CONTENTS - Contd.

[redacted] PARKING SYSTEM

Summary of 1968, 1969 and Projected 1970 Income & Operating cost by individual Facility.

Detailed Operating Statement for each Facility for 1968, 1969 and Projected 1970.

Parking rates presently in effect at each Facility.

I-7 PARKING

Summary of 1968, 1969 and Projected 1970 Income & Operating cost by individual Facility.

Detailed Operating Statement for each Facility for 1968, 1969 and Projected 1970.

Parking rates presently in effect at each Facility

Plaintiffs' Exhibit No. 1

FOREWORD

The following sheets present the 1968, 1969 and the projected 1970 Income and Expense statements of the individual parking lots or garages owned or operated by the several Plaintiffs.

Where the operations of a company, partnership or individual comprise several lots and/or garages, but the financial report of the enterprise consists of a consolidated statement, it was necessary, in order to construct the statements for the individual facilities involved, to allocate certain general items of expense such as general office rent, general insurance, pension fund expense, among the individual facilities in direct proportion, or in proportion to revenue or payroll. Such items as revenue, wages and salaries, Parking, Payroll and Business Privilege Taxes, maintenance and repairs, etc., were readily obtained from ledgers maintained for each facility. Although the operating statements constructed for each facility in this manner for the years 1968 and 1969 are unaudited, the total revenue and expenses equal the revenue and operating expenses shown on the audited consolidated statement for the particular enterprise involved.

Regarding the Business Privilege Tax, it should be recognized that the tax paid in any given year is the tax on the previous year's gross revenue.

The 1970 Projection is based on actual revenue for the first six months. This revenue was expanded to a twelve month figure on the basis that the first six months is 49.4% of the twelve month total. This split between the first and last half of the year was developed by totaling the first and last half year's totals for 33 lots and garages in the Downtown area for 1969. With the 1970 Projected Revenue thus established, the Parking Tax for 1970 was computed.

In those cases where rent is partially determined by revenue, the rent for 1970 was calculated accordingly, but where a lease called for a fixed rental, this amount of rent was used.

The average wage rate of garage attendants, the wages of which group comprise approximately 90% of the total payroll, will have increased approximately 10% in 1970 over 1969. In order to be on the conservative side, the Wage and Salary figures shown in this 1970 Projection are the 1969 amounts increased by 8%. All other items of expense shown in the 1970 Projection were assumed as being the same as in 1969.

On the summary sheet for each company, partnership or individual enterprise, there is shown the profit or loss for each facility for 1968 and 1969 and the projected profit or loss for 1970. In addition, there is shown for the year 1969 what the profit or loss would have been had the Parking Tax rate remained at 10%, and for the 1970 Projection what the profit or loss would be if the Parking Tax remained at 15% and what it would be if the Tax were reduced to 10%.

Plaintiffs' Exhibit No. 1

ALCO PARKING CORPORATION

ALCO PARKING CORPORATION

1968, 1969 AND PROJECTED 1970 INCOME AND OPERATING COSTS BY INDIVIDUAL FACILITIES

	6th & PENN GARAGE	GREYHOUND GARAGE	I.B.M. GARAGE	GATEWAY TOWERS GARAGE	MANOR GARAGE	P. & L.E. LOT	WHITE TOWER LOT	TRY STREET LOT	MAIDEN LANE LOT	U.S.O. LOT	TOTAL ALL GARAGES & LOTS
1968											
PARKING REVENUE	$ 380,124	$ 82,571	$ 86,848	$ 127,240	$ 138,044	$ 68,368	$ 35,252	$ 116,729	$ 248,808	$ 59,756	$ 1,343,740
OPERATING EXPENSE	345,792	93,091	75,814	124,326	133,097	52,811	38,657	101,950	213,068	54,713	1,233,319
OPERATING INCOME (LOSS)	34,332	(10,520)	11,034	2,914	4,947	15,557	(3,405)	14,779	35,740	5,043	110,421
INCOME AS PERCENT OF REVENUE	9.0%	0	12.7%	2.3%	3.6%	22.8%	0	12.6%	14.4%	8.4%	8.2%
1969											
PARKING REVENUE	395,862	83933	88,186	127,040	149,084	79,198	44,664	121,662	261,083	59,501	1,410,213
OPERATING EXPENSE	367,899	98,034	81,331	137,868	147,848	62,029	47,014	108,657	235,588	56,760	1,343,028
OPERATING INCOME (LOSS)	27,963	(14,101)	6,855	(10,828)	1,236	17,169	(2,350)	13,005	25,495	2,741	67,185
INCOME AS PERCENT OF REVENUE	7.1%	0	7.8%	0	0.83%	21.7%	0	10.7%	9.8%	4.6%	4.8%
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 10%	37,465	(10,236)	14,975	(8,988)	7,891	20,876	(490)	18,571	37,470	5,460	122,994
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	9.5%	0	17.0%	0	5.3%	26.4%	0	15.3%	14.4%	9.2%	8.7%
1970 PROJECTION											
PARKING REVENUE	370,445	85,826	97,801	139,443	147,992	82,146	50,162	126,933	293,115	52,583	1,446,446
OPERATING EXPENSE WITH PARKING TAX AT 20% EFF. 2-1-70	394,347	105,265	91,842	145,079	158,572	66,400	52,571	117,460	266,882	54,009	1,446,446
OPERATING INCOME (LOSS)	(23,902)	(19,439)	5,959	(5,636)	(10,580)	15,746	(2,409)	9,473	26,233	(1,426)	(5981)
INCOME AS PERCENT OF REVENUE	0	0	6.1%	0	0	19.2%	0	7.5%	8.9%	0	0
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 15%	(6,862)	(15,491)	10,458	(3,544)	(3,048)	19,525	(305)	15,312	39,717	993	56,755
INCOME WITH PARKING TAX OF 15% AS PERCENT OF REVENUE		0	10.7%	C	0	23.8%	0	12.1%	13.5%	1.9%	3.9%
OPERATING INCOME (LOSS) IF PARKING WERE 10%	11,660	(11,200)	15,348	(1,270)	3,702	23,632	1,982	21,659	54,372	3,622	123,507
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	3.1%	0	15.7%	0	2.5%	28.8%	4.0%	17.1%	18.5%	6.9%	8.5%

Plaintiffs' Exhibit No. 1

ALCO PARKING CORP.

OPERATING STATEMENT FOR:	6TH ST.-PENN AVE. GARAGE		480 SPRING PROJECTION
	1968	1969	1970
PARKING REVENUE	$380,124	$395,862	$370,146
OPERATING EXPENSE			
1. TAXES			
PARKING	34,254	40,088	72,407
REAL ESTATE			
PAYROLL	1,744	1,997	1,997
BUSINESS PRIVILEGE		2,158	2,375
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	250,000	250,000	250,000
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION			
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	30,664	33,905	36,617
MANAGEMENT FEE			
GROUP INSURANCE	1,597	1,777	1,777
PENSION EXPENSE	870	978	978
UNIFORM EXPENSE	150	274	274
4. PROFESSIONAL SERVICE:			
AUDITING	250	250	250
LEGAL	24		
OTHER			
5. GENERAL INSURANCE	2,280	2,665	2,665
6. MAINTENANCE & REPAIRS	12,905	13,431	13,431
7. MATERIALS & SUPPLIES	1,273	843	843
8. UNINSURED LOSSES	19	-	-
9. UTILITIES & TELEPHONE	9,755	10,166	10,166
10. MISCELLANEOUS UNALLOCATED EXP.	107	47	47
TOTAL OPERATING EXPENSE	345,792	367,896	394,347
OPERATING INCOME (LOSS)	34,332	27,963	(23,901)
INCOME AS PERCENT OF REVENUE	9.0	7.1	0
NOTES:			

ALCO PARKING CORP.

OPERATING STATEMENT FOR: GREYHOUND GARAGE 180 SPACES	1968	1969	1970 PROJECTION
PARKING REVENUE	$ 82,571	$ 83,933	$ 85,826
OPERATING EXPENSE			
1.TAXES			
PARKING	8,257	12,258	16,822
REAL ESTATE			
PAYROLL	1,718	1,921	1,921
BUSINESS PRIVILEGE		455	504
OTHER			
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	42,000	42,000	42,000
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION	80	80	80
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	31,434	32,721	35,33[illegible]
MANAGEMENT FEE			
GROUP INSURANCE	2,144	1,950	1,950
PENSION EXPENSE	1,272	1,110	1,110
UNIFORM EXPENSE	554	408	408
4.PROFESSIONAL SERVICE:			
AUDITING	100	100	100
LEGAL			
OTHER			
5.GENERAL INSURANCE	1,422	1,709	1,709
6.MAINTENANCE & REPAIRS	748	596	596
7.MATERIALS & SUPPLIES	876	383	383
8.UNINSURED LOSSES		115	115
9.UTILITIES & TELEPHONE	2,437	2,194	2,194
10.MISCELLANEOUS UNALLOCATED EXP.	49	34	34
TOTAL OPERATING EXPENSE	93,091	98,034	105,265
OPERATING INCOME (LOSS)	(10,520)	(14,101)	(19,439)
INCOME AS PERCENT OF REVENUE	0	0	0
NOTES:			

506a

Plaintiffs' Exhibit No. 1

ALCO PARKING CORP.

OPERATING STATEMENT FOR: I.B.M. BUILDING GARAGE (10 SPACES)

	1968	1969	1970 PROJECTED
PARKING REVENUE	$ 86,848	$ 88,186	$ 97,5[illegible]
OPERATING EXPENSE			
1. TAXES			
PARKING	8,685	12,879	19,3[illegible]
REAL ESTATE			
PAYROLL	1,258	1,430	1,430
BUSINESS PRIVILEGE		478	527
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	37,988	35,988	38,2[illegible]
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION	375	473	473
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	22,331	24,172	26,3[illegible]
MANAGEMENT FEE			
GROUP INSURANCE	1,040	1,997	1,997
PENSION EXPENSE	876	912	912
UNIFORM EXPENSE	411	421	421
4. PROFESSIONAL SERVICE:			
AUDITING	250	250	250
LEGAL			
OTHER			
5. GENERAL INSURANCE	1,462	1,467	1,467
6. MAINTENANCE & REPAIRS	520	175	175
7. MATERIALS & SUPPLIES	568	586	586
8. UNINSURED LOSSES	32	90	90
9. UTILITIES & TELEPHONE			
10. MISCELLANEOUS UNALLOCATED EXP.	18	13	13
TOTAL OPERATING EXPENSE	75,814	81,331	91,8[illegible]
OPERATING INCOME (LOSS)	11,034	6,855	5,7[illegible]
INCOME AS PERCENT OF REVENUE	12.7	7.8	6.1

NOTES:

ALCO PARKING CORP.

OPERATING STATEMENT FOR: GATEWAY TOWERS GARAGE 150 SPACES	1968	1969	1970 PROJECTION
PARKING REVENUE	$127,210*	$127,010*	$139,113*
OPERATING EXPENSE			
1.TAXES			
PARKING	5,145	5,810	8,915
REAL ESTATE			
PAYROLL	2,774	2,916	2,916
BUSINESS PRIVILEGE		700	837
OTHER	25		
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	63,443	67,527	67,527
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION			
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	18,550	19,617	53,586
MANAGEMENT FEE			
GROUP INSURANCE	2,629	2,729	2,729
PENSION EXPENSE	1,992	1,848	1,848
UNIFORM EXPENSE	914	1,010	1,010
4.PROFESSIONAL SERVICE:			
AUDITING	225	250	250
LEGAL			
OTHER			
5.GENERAL INSURANCE	2,235	2,313	2,312
6.MAINTENANCE & REPAIRS	1,510	623	623
7.MATERIALS & SUPPLIES	658	1,114	1,114
8.UNINSURED LOSSES	2,012	1,361	1,361
9.UTILITIES & TELEPHONE (Refund)	(9,130)	---	---
10.MISCELLANEOUS UNALLOCATED EXP.	10	21	21
TOTAL OPERATING EXPENSE	124,326	137,868	145,075
OPERATING INCOME (LOSS)	2,914	(10,828)	(5,536)
INCOME AS PERCENT OF REVENUE	2.3	0	0

NOTES:

* Includes revenue from tenant parking on which no parking tax is paid.

Plaintiffs' Exhibit No. 1

AICO PARKING CORP.

OPERATING STATEMENT FOR:	KAMOR GARAGE 1968	325 SPACES 1969	325 SPACES 1970 PROJECTED
PARKING REVENUE	$13?,0??*	$14?,0?4*	$??7,??
OPERATING EXPENSE			
1. TAXES			
PARKING	13,519	21,113	25,??
REAL ESTATE			
PAYROLL	1,496	1,812	1,??
BUSINESS PRIVILEGE		126	??
OTHER		20	??
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	80,840	?3,57?	?3,??
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION	107	119	1??
INTEREST			
DEPRECIATION			
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	26,515	30,341	??,??
MANAGEMENT FEE			
GROUP INSURANCE	1,?6?	1,633	1,??
PENSION EXPENSE	1,350	1,218	1,??
UNIFORM EXPENSE	563	537	5??
4. PROFESSIONAL SERVICE:			
AUDITING	250	250	2??
LEGAL			
OTHER			
5. GENERAL INSURANCE	1,1?5	1,111	1,??
6. MAINTENANCE & REPAIRS	956	1,238	1,??
7. MATERIALS & SUPPLIES	1,171	611	5??
8. UNINSURED LOSSES	95	?0	??
9. UTILITIES & TELEPHONE	2,215	2,?71	2,??
10. MISCELLANEOUS UNALLOCATED EXP.	136	35?	??
TOTAL OPERATING EXPENSE	133,0?7	147,?19	1??,??
OPERATING INCOME (LOSS)	4,?47	1,236	(10,??)
INCOME AS PERCENT OF REVENUE	3.6	0.?3	?

NOTES:

* Includes revenue from rental parking on which no parking tax is paid

ALCO PARKING CORP.

OPERATING STATEMENT FOR: P.A.L.E. LOT 600 SPACES

	1968	1969	1970 PROJECTION
PARKING REVENUE	$ 68,368	$ 79,198	$ 92,146
OPERATING EXPENSE			
1.TAXES			
PARKING	6,836	11,627	16,101
REAL ESTATE	284	336	336
PAYROLL	300	344	344
BUSINESS PRIVILEGE		150	475
OTHER			
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	36,919	40,537	39,527
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION			
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	5,635	6,024	6,506
MANAGEMENT FEE			
GROUP INSURANCE	359	359	359
PENSION EXPENSE	318	312	312
UNIFORM EXPENSE			
4.PROFESSIONAL SERVICE:			
AUDITING	100	125	125
LEGAL			
OTHER			
5.GENERAL INSURANCE	743	823	823
6.MAINTENANCE & REPAIRS	455	677	677
7.MATERIALS & SUPPLIES			
8.UNINSURED LOSSES	342	-	-
9.UTILITIES & TELEPHONE	433	615	615
10.MISCELLANEOUS UNALLOCATED EXP.	47	57	57
TOTAL OPERATING EXPENSE	52,811	62,029	66,100
OPERATING INCOME (LOSS)	15,557	17,169	15,716
INCOME AS PERCENT OF REVENUE	22.8	21.7	19.2
NOTES:			

510a

Plaintiffs' Exhibit No. 1

ALCO PARKING CORP.

OPERATING STATEMENT FOR: WHITE TOWER LOT 60 SPACES

	1968	1969	1970 PROJECTION
PARKING REVENUE	$ 35,252*	$ 44,661*	$ 50,160*
OPERATING EXPENSE			
1. TAXES			
PARKING	3,215	5,505	6,965
REAL ESTATE		110	110
PAYROLL	656	701	701
BUSINESS PRIVILEGE		135	267
OTHER	98	5	5
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	20,184	24,420	25,946
RENT FOR OFFICE - ALLOCATED		154	154
AMORTIZATION			
INTEREST			
DEPRECIATION			
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	11,795	11,716	12,596
MANAGEMENT FEE			
GROUP INSURANCE	282	908	908
PENSION EXPENSE	636	621	621
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING	125	125	125
LEGAL			
OTHER			
5. GENERAL INSURANCE	799	392	392
6. MAINTENANCE & REPAIRS	96	829	829
7. MATERIALS & SUPPLIES	355	179	179
8. UNINSURED LOSSES	26	168	168
9. UTILITIES & TELEPHONE	329	511	511
10. MISCELLANEOUS UNALLOCATED EXP.	71	201	201
TOTAL OPERATING EXPENSE	38,657	47,014	52,571
OPERATING INCOME (LOSS)	(3,405)	(2,350)	(2,411)
INCOME AS PERCENT OF REVENUE	0	0	0

NOTES:

*Includes rental parking by U.S. Gov't vehicles (post office) on which no parking tax is paid

ALCO PARKING CORP.

OPERATING STATEMENT FOR: DEY STREET LOT 320 SPACES

	1968	1969	1970 PROJECTION
PARKING REVENUE	$116,72[illegible]	$121,662	$126,033
OPERATING EXPENSE			
1.TAXES			
PARKING	11,673	17,732	24,[illegible]70
REAL ESTATE			
PAYROLL	956	[illegible]06	[illegible]65
BUSINESS PRIVILEGE		L0[illegible]	730
OTHER		17	17
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	62,215	66,975	65,[illegible]75
RENT FOR OFFICE - ALLOCATED		1,65	1,[illegible]5
AMORTIZATION			
INTEREST			
DEPRECIATION			
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	15,100	15,679	13,012
MANAGEMENT FEE			
GROUP INSURANCE	1,021	[illegible]2[illegible]	[illegible]2[illegible]
PENSION EXPENSE	[illegible]31	521	521
UNIFORM EXPENSE			
4.PROFESSIONAL SERVICE:			
AUDITING	250	250	250
LEGAL			
OTHER			
5.GENERAL INSURANCE	1,065	1,1[illegible]5	1,1[illegible]5
6.MAINTENANCE & REPAIRS	63	511	511
7.MATERIALS & SUPPLIES	[illegible]06	725	725
8.UNINSURED LOSSES	30[illegible]	561	561
9.UTILITIES & TELEPHONE	1,233	223	223
10.MISCELLANEOUS UNALLOCATED EXP.	133	218	218
TOTAL OPERATING EXPENSE	101,950	10[illegible],657	117,160
OPERATING INCOME (LOSS)	14,779	13,005	[illegible],473
INCOME AS PERCENT OF REVENUE	12.6	10.7	7.5
NOTES:			

512a

Plaintiffs' Exhibit No. 1

ALCO PARKING CORP.

OPERATING STATEMENT FOR: MAIDEN LANE LOT 600 SPACES	1968	1969	1970 PROJECTED
PARKING REVENUE	$218,808	$261,083	$291,[illegible]
OPERATING EXPENSE			
1. TAXES			
PARKING	24,981	32,083	37,[illegible]
REAL ESTATE		6	6
PAYROLL	1,976	2,355	2,[illegible]
BUSINESS PRIVILEGE		875	1,[illegible]
OTHER	5	36	[illegible]
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	141,074	140,[illegible]	143,[illegible]
RENT FOR OFFICE - ALLOCATED		[illegible]	[illegible]
AMORTIZATION			
INTEREST		21	21
DEPRECIATION			
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	35,561	35,153	42,[illegible]
MANAGEMENT FEE			
GROUP INSURANCE	2,132	1,52[illegible]	1,[illegible]
PENSION EXPENSE	1,21[illegible]	1,116	1,116
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING	250	250	250
LEGAL			
OTHER			
5. GENERAL INSURANCE	1,531	2,542	2,542
6. MAINTENANCE & REPAIRS	834	1,326	1,326
7. MATERIALS & SUPPLIES	410	1,10[illegible]	1,10[illegible]
8. UNINSURED LOSSES	543	797	797
9. UTILITIES & TELEPHONE	316	1,127	1,127
10. MISCELLANEOUS UNALLOCATED EXP.	2,257	95	[illegible]
TOTAL OPERATING EXPENSE	213,069	235,598	266,[illegible]
OPERATING INCOME (LOSS)	35,740	25,[illegible]95	26,211
INCOME AS PERCENT OF REVENUE	14.1	[illegible].8	[illegible]
NOTES:			

Plaintiffs' Exhibit No. 1 513a

ALCO PARKING CORP.

OPERATING STATEMENT FOR: U.S.O. 1CT 90 SPACES

	1968	1969	1970 PROJECTION
PARKING REVENUE	$ 59,756	$ 59,501	$ 52,583
OPERATING EXPENSE			
1.TAXES			
PARKING	5,976	8,665	10,306
REAL ESTATE			
PAYROLL	591	650	605
BUSINESS PRIVILEGE		129	357
OTHER		8	8
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	33,882	32,023	26,607
RENT FOR OFFICE - ALLOCATED		228	228
AMORTIZATION			
INTEREST			
DEPRECIATION			
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	10,650	10,875	11,716
MANAGEMENT FEE			
GROUP INSURANCE	524	811	814
PENSION EXPENSE	636	624	524
UNIFORM EXPENSE			
4.PROFESSIONAL SERVICE:			
AUDITING	125	125	125
LEGAL			
OTHER			
5.GENERAL INSURANCE	799	570	570
6.MAINTENANCE & REPAIRS	302	753	753
7.MATERIALS & SUPPLIES	609	400	400
8.UNINSURED LOSSES	63	37	37
9.UTILITIES & TELEPHONE	451	580	580
10.MISCELLANEOUS UNALLOCATED EXP.	102	185	185
TOTAL OPERATING EXPENSE	54,713	56,760	53,964
OPERATING INCOME (LOSS)	5,043	2,741	(1,381)
INCOME AS PERCENT OF REVENUE	8.4	4.6	0
NOTES:			

Plaintiffs' Exhibit No. 1

ALCO PARKING CORPORATION

PARKING RATES PRESENTLY IN EFFECT

ALLEGHENY CENTER GARAGE*
In Allegheny Center, Northside
RATES EFFECTIVE FEBRUARY 1, 1970

DAY RATES		NIGHT RATES	
8:00 A.M. - 10:00 P.M.:		6:00 P.M. - 8:00 A.M.:	
1 Hour or Less	$ .25	1 Hour or Less	$ .25
2 Hours or Less	$ .50	2 Hours or Less	$ .50
Each additional hour to 10 hours	$ .25	3 Hours or Less	$ .75
Over 10 hours to 24 hours	$ 2.75	4 Hours or Less	$ 1.00
		2 A.M. to 8 A.M.	$ 1.00
Monthly	$33.00	24 Hours Maximum	$ 2.75
Special Ticket Rate (20 Tickets)	$14.00		

* Rates are fixed by Pittsburgh Parking Authority in consultation with Lessee.

SIXTH & PENN GARAGE
Corner of Sixth Street & Penn Avenue
RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATES		NIGHT RATES	
1 Hour	$ .75	1 Hour	$ .75
2 Hours	$ 1.00	2 Hours	$ 1.00
3 Hours	$ 1.25	3 Hours to 3 A.M.	$ 1.25
4 Hours	$ 1.50	3 Hours to 8 A.M.	$ 1.50
5 Hours	$ 1.75	5:30 P.M. to 8 A.M.	$ 1.50
6 Hours	$ 2.00		
7 to 8 Hours	$ 2.25	Monthly Rate	$43.00
8 to 9 Hours	$ 2.50		
8 to 24 Hours	$ 2.50		

ALCO PARKING CORPORATION - Contd.

GREYHOUND GARAGE
Penn Avenue at 12th Street
RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATE		NIGHT RATE
Hour	$ .60	
Hours	$ .70	
Hours	$ .90	
Hours	$ 1.00	
Hours	$ 1.30	
to 8 Hours	$ 1.50	
to 10 Hours	$ 1.75	
Hours	$ 1.90	
Hours	$ 2.15	
to 24 Hours	$ 2.40	

IBM GARAGE
Boulevard of the Allies & Stanwix Street
RATES EFFECTIVE DECEMBER 31, 1969

DAY RATE		NIGHT RATE	
Hour	$ .75	1 Hour	$ .75
Hours	$ 1.00	2 Hours to 3:00 A.M.	$ 1.00
Hours	$ 1.25	6:00 P.M. to 3:00 A.M.	$ 1.25
Hours	$ 1.50	6:00 P.M. to 8:00 A.M.	$ 2.00
Hours	$ 1.75		
Hours	$ 2.00		
Hours	$ 2.25		
to 12 Hours	$ 2.50		
to 16 Hours	$ 2.75		
to 24 Hours	$ 3.00		
Monthly Rate	$44.00		

Plaintiffs' Exhibit No. 1

ALCO PARKING CORPORATION - Contd.

GATEWAY TOWERS GARAGE
Ft. Duquesne Boulevard & Commonwealth Place

RATES EFFECTIVE IN 1968

DAY RATE		NIGHT RATE	
1 Hour	$ .50	1 Hour or Less	$ .75
2 Hours	$ .75	2 Hours	$ 1.00
3 Hours	$ 1.00	6:00 P.M. to 3:00 A.M.	$ 1.00
Each additional hour	$ .25	6:00 P.M. to 8:00 A.M.	$ 1.75
Maximum for 24 hours	$ 3.00		
Monthly Rate	$39.00		
Weekly Rate	$15.00		

MANOR GARAGE
Forbes Avenue near Ross Street

RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATE		NIGHT RATE	
1 Hour	$ .65	4:00 P.M. to Midnight	$ .55
2 Hours	$ .85		
3 Hours	$ 1.00		
4 Hours	$ 1.30		
5 Hours	$ 1.50		
5 to 9 Hours	$ 1.70		
Each additional hour	$ .20		
Maximum	$ 2.50		
Monthly Rate	$37.00		

P. & L. E. LOT
Former Freight Yard, South End Of Smithfield Street Bridge

RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATE		NIGHT RATE
All Day	$ .75	

ALCO PARKING CORPORATION - Contd.

WHITE TOWER LOT
Liberty Avenue between 10th and 11th Streets
RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATE		NIGHT RATE	
1 Hour	$ .60	1 Hour	$ .60
2 Hours	$ .85	2 Hours	$ .85
3 Hours	$ 1.15	Over 2 Hours to 12:00 Midnight	$ 1.10
4 Hours	$ 1.40	Saturday Parking	$ 1.15
5 Hours	$ 1.65		
6 Hours	$ 1.90		
7 Hours	$ 2.15		
Maximum	$ 2.15		
Monthly Parking	$32.50		

TRY STREET LOT
Second Avenue near Try Street
RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATE		NIGHT RATE	
7:00 A.M. to 6:00 P.M.	$ 1.60		

MAIDEN LANE LOT
10th Street to 11th Street, North of Penn Avenue
RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATE		NIGHT RATE	
All Day	$ 1.50	5:00 P.M. to 6:00 A.M.	$ .60
		Saturday Parking	$ 1.15

U. S. O. LOT
P-C R. R. Station
RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATE		NIGHT RATE	
1 Hour	$ .70	6:00 P.M. to 8:00 A.M.	$ 1.00
2 Hours	$ .85	Saturday Parking	$ 1.25
3 Hours	$ 1.15	Sundays & Holidays	$ 1.00
4 Hours	$ 1.40		
5 Hours	$ 1.65		
6 Hours	$ 1.90		
7 to 12 Hours	$ 2.50		

Plaintiffs' Exhibit No. 1

WILLIAM PENN PARKING LOTS

Plaintiffs' Exhibit No. 1

519a

WILLIAM PENN PARKING LOTS

1968, 1969 AND PROJECTED 1970 INCOME AND OPERATING COSTS BY INDIVIDUAL FACILITIES

1968	WATER ST. LOT	PENN-BARKER LOT	BARRY LOT	DUQUESNE LOT	10th ST. & PENN LOT	MOSQUE LOT	MASONIC TEMPLE LOT	WASHINGTON PLAZA LOT	BIGELOW APARTMENTS GARAGE	TOTAL ALL LOTS & GARAGES
PARKING REVENUE	$ 45,580	$ 18,581	$ 59,663	$ 59,712	$ 30,431	$ 86,532	$ 127,483	$ 49,919	$ 92,417	$ 570,318
OPERATING EXPENSE	33,530	22,870	63,031	52,979	26,335	80,276	89,318	42,527	98,916	509,827
OPERATING INCOME (LOSS)	12,050	(4,289)	(3,368)	6,733	4,096	6,256	38,165	7,392	(6,544)	60,491
INCOME AS PERCENT OF REVENUE	26.4%	0	0	11.3%	13.5%	7.2%	29.9%	14.8%	0	10.6%
1969										
PARKING REVENUE	53,766	19,635	65,907	67,326	48,688	97,596	148,586	62,776	88,762	653,042
OPERATING EXPENSE	56,230	23,331	66,056	60,437	41,109	91,110	113,499	55,596	97,682	605,050
OPERATING INCOME (LOSS)	(2,464)	(3,696)	(149)	6,889	7,579	6,486	35,087	7,180	(8,920)	47,992
INCOME AS PERCENT OF REVENUE	0	0	0	10.2%	15.6%	6.6%	23.6%	11.4%	0	7.3%
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 10%	9	(2,792)	2,874	9,982	9,835	11,023	41,928	10,096	(7,188)	75,765
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	0	0	4.4%	14.8%	20.2%	11.3%	28.2%	16.1%	0	11.6%
1970 PROJECTION										
PARKING REVENUE	56,117	19,854	70,628	70,798	56,668	97,470	126,704	70,547	92,785	661,571
OPERATING EXPENSE WITH PARKING TAX AT 20% EFF. 2-1-70	60,458	25,172	71,604	66,022	47,280	97,593	131,215	62,903	103,027	665,274
OPERATING INCOME (LOSS)	(4,341)	(5,318)	(976)	4,776	9,388	(123)	(4,511)	7,644	(10,242)	(3,703)
INCOME AS PERCENT OF REVENUE	0	0	0	6.7%	16.9%	0	0	10.8%	0	0
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 15%	(1,759)	(4,425)	1,297	8,174	11,995	4,360	1,317	10,889	(8,458)	23,389
INCOME WITH PARKING TAX OF 15% AS PERCENT OF REVENUE	0	0	1.8%	11.5%	21.1%	4.5%	1.0%	15.4%	0	3.5%
OPERATING INCOME (LOSS) IF PARKING WERE 10%	1,046	(3,412)	5,805	11,714	14,828	9,234	7,653	14,416	(6,523)	54,761
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	1.9%	0	8.2%	16.5%	26.2%	9.5%	6.0%	20.4%	0	8.3%

Plaintiffs' Exhibit No. 1

WM. PENN PARKING LOTS

OPERATING STATEMENT FOR: BARRY LOT

	1968	1969	19 Second PROJECTED
PARKING REVENUE	$ 59,663	$ 65,907	$ 70,6[illegible]
OPERATING EXPENSE			
1. TAXES			
PARKING	5,966	6,611	13,23[illegible]
REAL ESTATE	16,520	14,936	14,936
PAYROLL	816	880	880
BUSINESS PRIVILEGE		335	335
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	18,000	18,000	18,000
RENT FOR OFFICE - ALLOCATED	100	100	100
AMORTIZATION			
INTEREST		270	270
DEPRECIATION	662	643	643
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	16,520	15,738	15,997
MANAGEMENT FEE			
GROUP INSURANCE	971	963	963
PENSION EXPENSE	570	655	655
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING	374	372	372
LEGAL		165	165
OTHER			
5. GENERAL INSURANCE	777	666	666
6. MAINTENANCE & REPAIRS		165	165
7. MATERIALS & SUPPLIES	698	808	808
8. UNINSURED LOSSES			
9. UTILITIES & TELEPHONE	915	916	916
10. MISCELLANEOUS UNALLOCATED EXP.	382	326	326
TOTAL OPERATING EXPENSE	63,301	66,056	71,661
OPERATING INCOME (LOSS)	(3,638)	(149)	(5[illegible])
INCOME AS PERCENT OF REVENUE	0	0	0

NOTES:

MM. PENN PARKING LOTS

OPERATING STATEMENT FOR: DUQUESNE LOT 105 Spaces

	1968	1969	1970 PROJECTION
PARKING REVENUE	$ 59,712	$ 67,326	$ 70,708
OPERATING EXPENSE			
1. TAXES			
PARKING	5,971	9,826	11,018
REAL ESTATE		1,979	1,979
PAYROLL	631	651	651
BUSINESS PRIVILEGE		343	343
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	29,127	30,308	30,770
RENT FOR OFFICE - ALLOCATED	100	100	100
AMORTIZATION			
INTEREST		276	276
DEPRECIATION	662	657	657
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	12,323	11,619	12,580
MANAGEMENT FEE			
GROUP INSURANCE	760	566	566
PENSION EXPENSE	313	343	343
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING	371	390	390
LEGAL		475	475
OTHER			
5. GENERAL INSURANCE	777	192	192
6. MAINTENANCE & REPAIRS		479	479
7. MATERIALS & SUPPLIES	507	489	489
8. UNINSURED LOSSES	81	322	322
9. UTILITIES & TELEPHONE	939	868	868
10. MISCELLANEOUS UNALLOCATED EXP.	209	234	234
TOTAL OPERATING EXPENSE	52,979	60,437	66,022
OPERATING INCOME (LOSS)	6,733	6,889	4,776
INCOME AS PERCENT OF REVENUE	11.3	10.2	6.7

NOTES:

524a

Plaintiffs' Exhibit No. 1

MR. PENN PARKING LOTS

OPERATING STATEMENT FOR: 10TH & PENN LOT

	1968	1969	50 Spaces 1970 PROJECTED
PARKING REVENUE	$ 30,431	$ 43,[illegible]	$ [illegible]
OPERATING EXPENSE			
1. TAXES			
PARKING	3,043	7,125	11,[illegible]
REAL ESTATE			
PAYROLL	372	65[illegible]	[illegible]
BUSINESS PRIVILEGE		218	[illegible]
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	12,450	16,[illegible]50	12,[illegible]
RENT FOR OFFICE - ALLOCATED	100	100	[illegible]
AMORTIZATION			
INTEREST		200	[illegible]
DEPRECIATION	331	475	[illegible]
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	7,262	11,732	12,[illegible]
MANAGEMENT FEE			
GROUP INSURANCE	171	554	[illegible]
PENSION EXPENSE	251	313	[illegible]
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING	138	275	[illegible]
LEGAL		343	[illegible]
OTHER			
5. GENERAL INSURANCE	354	496	[illegible]
6. MAINTENANCE & REPAIRS	404	346	[illegible]
7. MATERIALS & SUPPLIES	515	377	[illegible]
8. UNINSURED LOSSES		30	[illegible]
9. UTILITIES & TELEPHONE	460	783	[illegible]
10. MISCELLANEOUS UNALLOCATED EXP.	75	173	[illegible]
TOTAL OPERATING EXPENSE	26,335	41,109	47,[illegible]
OPERATING INCOME (LOSS)	4,096	7,579	[illegible]
INCOME AS PERCENT OF REVENUE	13.5	15.6	[illegible]

NOTES:

WM. PENN PARKING LOTS

OPERATING STATEMENT FOR: MOSQUE LOT 200 Spaces

	1968	1969	1970 PROJECTION
PARKING REVENUE	$ 86,532	$ 97,596	$ 97,470
OPERATING EXPENSE			
1.TAXES			
PARKING	8,653	14,297	19,104
REAL ESTATE		2,668	2,668
PAYROLL	998	1,109	1,109
BUSINESS PRIVILEGE		497	586
OTHER		70	70
2.EXPENSE RELATED TO USE OF PROPERTY:			
RENT OF PROPERTY	15,100	15,100	15,100
RENT FOR OFFICE - ALLOCATED	100	100	100
AMORTIZATION			
INTEREST		100	100
DEPRECIATION	952	952	952
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	19,519	19,833	21,120
MANAGEMENT FEE			
GROUP INSURANCE	137	512	512
PENSION EXPENSE	275	314	314
UNIFORM EXPENSE			
4.PROFESSIONAL SERVICE:			
AUDITING	538	550	550
LEGAL		688	688
OTHER			
5.GENERAL INSURANCE	1,118	835	835
6.MAINTENANCE & REPAIRS	336	694	694
7.MATERIALS & SUPPLIES	820	663	663
8.UNINSURED LOSSES	325	481	481
9.UTILITIES & TELEPHONE	846	947	947
10.MISCELLANEOUS UNALLOCATED EXP.	225	236	236
TOTAL OPERATING EXPENSE	80,275	91,110	97,593
OPERATING INCOME (LOSS)	6,256	6,486	(123)
INCOME AS PERCENT OF REVENUE	7.2	6.6	0
NOTES:			

Plaintiffs' Exhibit No. 1

WM. PENN PARKING LOTS

OPERATING STATEMENT FOR: MASONIC TEMPLE LOT	1968	1969	360 Spruce 1970 PROJECTION
PARKING REVENUE	$127,483	$148,596	$126,[illegible]
OPERATING EXPENSE			
1. TAXES			
PARKING	12,718	21,609	21,[illegible]
REAL ESTATE			
PAYROLL	960	1,111	1,111
BUSINESS PRIVILEGE		756	9[illegible]
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY.			
RENT OF PROPERTY	48,000	57,000	70,000
RENT FOR OFFICE - ALLOCATED	200	200	200
AMORTIZATION			
INTEREST		610	610
DEPRECIATION	1,431	1,449	1,[illegible]
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	13,779	20,553	21,[illegible]
MANAGEMENT FEE			
GROUP INSURANCE	514	768	76[illegible]
PENSION EXPENSE	377	311	31[illegible]
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING	900	837	837
LEGAL		1,047	1,047
OTHER			
5. GENERAL INSURANCE	1,663	858	86[illegible]
6. MAINTENANCE & REPAIRS	328	1,057	1,057
7. MATERIALS & SUPPLIES	1,230	1,097	1,097
8. UNINSURED LOSSES	194	1,690	1,690
9. UTILITIES & TELEPHONE	1,856	2,073	2,073
10. MISCELLANEOUS UNALLOCATED EXP.	175	311	311
TOTAL OPERATING EXPENSE	89,318	113,499	131,215
OPERATING INCOME (LOSS)	38,165	35,087	(4,511)
INCOME AS PERCENT OF REVENUE	29.9	23.6	[illegible]
NOTES:			

VAN PEEBLES PARKING LOTS

OPERATING STATEMENT FOR: WASHINGTON PLAZA LOT 130 Spaces

	1968	1969	1970 PROJECTION
PARKING REVENUE	$ 49,919	$ 62,776	$ 70,547
OPERATING EXPENSE			
1.TAXES			
PARKING	4,392	9,194	13,927
REAL ESTATE			
PAYROLL	457	627	627
BUSINESS PRIVILEGE		319	377
OTHER			
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	24,796	25,727	31,116
RENT FOR OFFICE - ALLOCATED	100	100	100
AMORTIZATION			
INTEREST		257	257
DEPRECIATION	504	613	613
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	8,929	11,209	12,106
MANAGEMENT FEE			
GROUP INSURANCE	353	256	256
PENSION EXPENSE	270	31	31
UNIFORM EXPENSE			
4.PROFESSIONAL SERVICE:			
AUDITING	285	354	354
LEGAL		442	442
OTHER			
5.GENERAL INSURANCE	553	356	356
6.MAINTENANCE & REPAIRS	174	116	116
7.MATERIALS & SUPPLIES	527	182	182
8.UNINSURED LOSSES	31	27	27
9.UTILITIES & TELEPHONE	599	1,003	1,003
10.MISCELLANEOUS UNALLOCATED EXP.	278	113	113
TOTAL OPERATING EXPENSE	42,527	55,566	62,503
OPERATING INCOME (LOSS)	7,392	7,190	7,644
INCOME AS PERCENT OF REVENUE	14.8	11.4	10.8
NOTES:			

Plaintiffs' Exhibit No. 1

WM. PENN PARKING LOTS

OPERATING STATEMENT FOR: BIGELOW APARTMENTS GARAGE 150 Spaces

	1968	1969	1970 PROJECTION
PARKING REVENUE	$ 92,417*	$ 88,752*	$ 92,7??
OPERATING EXPENSE			
1. TAXES			
PARKING	3,861	5,496	7,9??
REAL ESTATE			
PAYROLL	2,118	2,181	2,1??
BUSINESS PRIVILEGE		509	5??
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	36,000	36,000	36,000
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION			
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	42,976	40,634	43,???
MANAGEMENT FEE			
GROUP INSURANCE	3,455	2,729	2,7??
PENSION EXPENSE	2,850	2,094	2,0??
UNIFORM EXPENSE	780	800	8??
4. PROFESSIONAL SERVICE:			
AUDITING	1,650	1,625	1,6??
LEGAL	1,203	1,200	1,2??
OTHER			
5. GENERAL INSURANCE	1,877	1,940	1,9??
6. MAINTENANCE & REPAIRS	725	346	3??
7. MATERIALS & SUPPLIES	902	882	8??
8. UNINSURED LOSSES	564	1,235	1,2??
9. UTILITIES & TELEPHONE			
10. MISCELLANEOUS UNALLOCATED EXP.		11	1?
TOTAL OPERATING EXPENSE	98,961	97,682	103,???
OPERATING INCOME (LOSS)	(6,544)	(8,920)	(10,?2?)
INCOME AS PERCENT OF REVENUE	0	0	0

NOTES:

*Includes revenue from Tenant Parking on which no parking tax is paid.

WILLIAM PENN PARKING LOT

PARKING RATES PRESENTLY IN EFFECT

WATER STREET LOT

119-129 Ft. Pitt Boulevard

RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATES		NIGHT RATES	
1 Hour	$ .60	Night Parking	$ .75
2 Hours	$ .85		
3 Hours	$ 1.10		
4 Hours	$ 1.65		
5 Hours to 24 Hours	$ 1.90		
Monthly Rate	$36.00		

Effective January 1, 1970

PENN-BARKER LOT

Penn Avenue & Barker Place

RATES EFFECTIVE SEPTEMBER 15, 1969

DAY RATES		NIGHT RATES	
1/2 Hour	$ .60	1 Hour	$ .85
1 Hour	$ .90	Over 1 Hour to 7 A.M.	$ 1.35
2 Hours	$ 1.25	6 P.M. to 8 A.M.	$ 2.00
Each Additional Hour	$ .25	Maximum for 24 Hours	$ 3.50
Maximum	$ 3.50		

BARRY LOT

Penn Avenue at Seventh Street

RATES EFFECTIVE SEPTEMBER 15, 1969

DAY RATES		NIGHT RATES	
1/2 Hour	$ .60	6 P.M. to 12:00 Midnight	$ .85
1 Hour	$ .80	1 Hour or Over	$ 1.35
1 1/2 Hours	$ 1.10	Maximum between 6 P.M. & 12:00 Midnight	$ 1.35
2 Hours	$ 1.40		
2 1/2 Hours	$ 1.70		
3 Hours	$ 2.00		
3 1/2 Hours	$ 2.30		
4 Hours	$ 2.60		
4 1/2 Hours	$ 2.90		
5 Hours	$ 3.20		
Maximum	$ 3.50		
Sundays & Holidays	$ 1.35		

Plaintiffs' Exhibit No. 1

WILLIAM PENN PARKING LOT - Contd.

DUQUESNE LOT
10th Street near Ft. Duquesne Boulevard
RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATE		NIGHT RATE	
All Day	$ 1.60	After 6:00 P.M.	$ .60 Maximum

10th AND PENN LOT
Corner of 10th Street and Penn Avenue
RATES EFFECTIVE SEPTEMBER 15, 1969

DAY RATE		NIGHT RATE	
1 Hour	$ .65	1 Hour	$ .70
2 Hours	$ .90	2 Hours	$ .90
3 Hours	$ 1.25	Over 2 Hours (To 12:00 Midnight)	$ 1.20
4 Hours	$ 1.50		
5 Hours	$ 1.75	Saturday Parking	$ 1.25
6 Hours	$ 2.00		
7 Hours	$ 2.25		
8 Hours	$ 2.35		
Maximum	$ 2.35		

MOSQUE LOT
Bigelow Boulevard
RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATE		NIGHT RATE	
8 A.M. to 6 P.M.	$ 1.00	6 P.M. to Midnight	$ 1.50
After 6 P.M. (Monday thru Friday) — add additional $.50			
Saturday, Sunday & Holidays	$ 1.50		
University of Pittsburgh Permits, 8:00 A.M. to 6:00 P.M.	$ .80		
6:00 P.M. to Midnight	$ 1.25		

WILLIAM PENN PARKING LOT - Contd.

TEMPLE LOT
Masonic Temple - Ritten & Tennyson Avenue

RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATE		NIGHT RATE	
8 A.M. to 6 P.M.	$ 1.00	6 P.M. to Midnight	$ 1.50
After 6 P.M. (Monday thru Friday) — add additional $.50			
Saturday, Sunday & Holidays	$ 1.50		
University of Pittsburgh Permits, 8:00 A.M. to 6:00 P.M.	$ .80		
6:00 P.M. to Midnight	$ 1.25		

WASHINGTON LOT
Colwell Street near Epiphany Church

RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATE		NIGHT RATE	
All Day	$ 1.00	After 6:00 P.M.	$ 1.00 Maximum

BIGELOW APARTMENT GARAGE
Bigelow Boulevard and Chatham Street

RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATE		NIGHT RATE
1 Hour	$ .60	
2 Hours	$ .85	
3 Hours	$ 1.15	
Each additional hour	$ .25	
Maximum for 24 Hours	$ 2.50	
Monthly Rates (Outside)	$33.50	
Monthly Rates (Residents)	$27.50	
24 Hours (Outside)	$39.00	
Weekly Rate	$12.00	

Plaintiffs' Exhibit No. 1

PARKING SERVICE CORPORATION

PARKING SERVICE CORPORATION

1968, 1969 AND PROJECTED 1970 INCOME AND OPERATING COSTS BY INDIVIDUAL FACILITIES

1968	BIGELOW BLVD. & THIRD AVE. GARAGE	NINTH ST. GARAGE	GATEWAY CENTER GARAGE	TOTAL
PARKING REVENUE	$ 759,754	$ 323,180	$ 635,353	$ 1,718,293
OPERATING EXPENSE	755,305	316,442	624,759	1,696,506
OPERATING INCOME (LOSS)	4,449	6,738	10,600	21,787
INCOME AS PERCENT OF REVENUE	0.6%	2.1%	1.7%	1.3%
1969				
PARKING REVENUE	817,474	333,652	710,382	1,861,508
OPERATING EXPENSE	907,244	347,374	713,741	1,968,359
OPERATING INCOME (LOSS)	(89,770)	(13,722)	(3,359)	(106,851)
INCOME AS PERCENT OF REVENUE	0	0	0	0
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 10%	(52,314)	981	25,451	(25,882)
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	0	0.3%	3.6%	0
1970 PROJECTION				
PARKING REVENUE	905,034	359,684	700,546	1,965,264
OPERATING EXPENSE WITH PARKING TAX AT 20% EFF. 2-1-70	983,518	374,461	726,172	2,084,151
OPERATING INCOME (LOSS)	(78,484)	(14,777)	(25,626)	(118,887)
INCOME AS PERCENT OF REVENUE	0	0	0	0
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 15%	(36,852)	1,768	6,599	(28,485)
INCOME WITH PARKING TAX OF 15% AS PERCENT OF REVENUE	0	0.5%	0.94%	0
OPERATING INCOME (LOSS) IF PARKING WERE 10%	8,400	20,753	41,626	50,779
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	0.9%	5.8%	5.9%	2.6%

534a

Plaintiffs' Exhibit No. 1

PARKING SERVICE CORPORATION

OPERATING STATEMENT FOR: BIGELOW BOULEVARD & THIRD AVE. GARAGES

BLVD. GARAGE - 724 SPACES 3 RD. AVE. GARAGE - 838 " "	1968	1969	1970 PROJECTED
PARKING REVENUE	$759,754	$817,474	[illegible]
OPERATING EXPENSE			
1. TAXES			
PARKING	75,896	119,204	117,30
REAL ESTATE			
PAYROLL	10,933	11,448	12,41
BUSINESS PRIVILEGE		4,357	5,43
OTHER	1,062	1,265	1,33
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	*344,511	*333,000	*333,00
RENT FOR OFFICE - ALLOCATED			
INTEREST		3	0
DEPRECIATION	1,016	908	90
2-A. CAPITAL EXPOSURE CREDIT		65,826	(3,2
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	189,597	200,846	214,71
MANAGEMENT FEE	36,500 (1)	39,050	38,63
GROUP INSURANCE	13,212	12,546	12,54
PENSION EXPENSE	9,672	9,354	9,74
UNIFORM EXPENSE	3,227	3,459	3,58
4. PROFESSIONAL SERVICE:			
AUDITING	2,400	2,400	2,40
LEGAL	2,880	2,880	2,88
OTHER	1,900	1,775	1,77
5. GENERAL INSURANCE	6,572	7,548	7,54
6. MAINTENANCE & REPAIRS	23,900	63,408	63,40
7. MATERIALS & SUPPLIES	5,335	4,211	4,21
8. UNINSURED LOSSES	3,665	2,347	2,34
9. UTILITIES & TELEPHONE	22,916	18,149	18,14
10. MISCELLANEOUS UNALLOCATED EXP	3,111	3,220	3,22
TOTAL OPERATING EXPENSE	755,305	907,244	905,58
OPERATING INCOME (LOSS) **	4,449	(89,770)	(72,48
INCOME AS PERCENT OF REVENUE	0.6	0	0

NOTES: These garages are owned by the Pittsburgh Parking Authority and are exempt from payment of real estate taxes to the City, County, and School [illegible]

* Excludes fixed rents for commercial space in Bigelow Blvd. Garage.

** Any operating income is shareable on a 50 - 50 basis between lessee and lessor.

(1) Officers' salaries in 1968.

PARKING SERVICE CORPORATION

OPERATING STATEMENT FOR: NINTH STREET GARAGE (1) 581 SPACES

	1968	1969	1970 PROJECTION
PARKING REVENUE	$323,180	$333,652	$359,644
OPERATING EXPENSE			
1.TAXES			
PARKING	31,589	48,068	20,494
REAL ESTATE			
PAYROLL	2,739	3,181	3,181
BUSINESS PRIVILEGE		1,780	2,002
OTHER			
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	199,213	160,000	160,000
RENT FOR OFFICE-ALLOCATED			
INTEREST		17	17
DEPRECIATION	290	290	290
2-A.CAPITAL EXPOSURE CREDIT		28,600	28,600
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	50,264	55,437	59,878
MANAGEMENT FEE		14,525	14,525
GROUP INSURANCE	4,360	3,894	3,894
PENSION EXPENSE	3,210	2,820	2,820
UNIFORM EXPENSE	789	666	666
4.PROFESSIONAL SERVICE:			
AUDITING	1,200	1,200	1,200
LEGAL	1,200	1,200	1,200
OTHER	925	900	900
5.GENERAL INSURANCE	1,826	2,040	2,040
6.MAINTENANCE & REPAIRS	10,694	12,493	12,493
7.MATERIALS & SUPPLIES	2,017	3,543	3,543
8.UNINSURED LOSSES		84	84
9.UTILITIES & TELEPHONE	5,887	6,319	6,319
10.MISCELLANEOUS UNALLOCATED EXP.	239	117	117
TOTAL OPERATING EXPENSE	316,442	347,374	374,461
OPERATING INCOME (LOSS)	6,738	(13,722)	(14,777)
INCOME AS PERCENT OF REVENUE	2.1	0	0

NOTES: (1) This garage is owned by the Pittsburgh Parking Authority and is exempt from payment of Real Estate Taxes to the City, County and School District.

Any operating income for 1969 and thereafter is shareable on a 50-50 basis between lessee and lessor.

Plaintiffs' Exhibit No. 1

PARKING SERVICE CORPORATION

OPERATING STATEMENT FOR: GATEWAY CENTER GARAGE 750 SPACES

	1968	1969	1970 PROJECTED
PARKING REVENUE	$635,359	$710,302	$790,5[illegible]
OPERATING EXPENSE			
1. TAXES			
PARKING	61,018	99,848	137,7[illegible]
REAL ESTATE	129,242	148,083	148,0[illegible]
PAYROLL	5,374	6,122	6,[illegible]
BUSINESS PRIVILEGE		3,497	3,[illegible]
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	265,203	285,970	291,[illegible]
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION	1,115	53	[illegible]
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	97,332	103,494	111,7[illegible]
MANAGEMENT FEE			
GROUP INSURANCE	7,072	6,079	6,[illegible]
PENSION EXPENSE	4,794	3,870	3,[illegible]
UNIFORM EXPENSE	1,875	1,270	1,[illegible]
4. PROFESSIONAL SERVICE:			
AUDITING	1,500	1,500	1,[illegible]
LEGAL			
OTHER			
5. GENERAL INSURANCE	9,363	9,792	9,[illegible]
6. MAINTENANCE & REPAIRS	7,548	17,441	17,[illegible]
7. MATERIALS & SUPPLIES	2,391	3,017	3,[illegible]
8. UNINSURED LOSSES	813	593	[illegible]
9. UTILITIES & TELEPHONE	24,811	15,767	15,[illegible]
10. MISCELLANEOUS UNALLOCATED EXP.	6,308	6,223	6,[illegible]
TOTAL OPERATING EXPENSE	624,759	715,741	796,[illegible]
OPERATING INCOME (LOSS)	10,600	(3,359)	(5,[illegible])
INCOME AS PERCENT OF REVENUE	1.7	0	[illegible]

NOTES:

PARKING SERVICE CORPORATION *

PARKING RATES PRESENTLY IN EFFECT

RATES EFFECTIVE FEBRUARY 1, 1970

BIGELOW BOULEVARD GARAGE — Bigelow Blvd. at Sixth Ave.

THIRD AVENUE GARAGE — Third Avenue near Wood Street

NINTH STREET GARAGE — Ninth Street at Penn Avenue

DAY RATE:
8:00 A.M. to 6:00 P.M.

1 Hour or Less	$ .45
2 Hours or Less	$ .60
3 Hours or Less	$ .90
4 Hours or Less	$ 1.00
5 Hours or Less	$ 1.35
6 Hours or Less	$ 1.55
7 Hours or Less	$ 1.65
8 Hours or Less	$ 1.80
9 Hours or Less	$ 1.85
10 Hours or Less	$ 2.00
11 Hours or Less	$ 2.10
12 Hours or Less	$ 2.40
13 Hours or Less	$ 2.40
13 to 24 Hours, Maximum	$ 2.50

NIGHT RATE:
6:00 P.M. to 8:00 A.M.

1 Hour or Less	$ .45
2 Hours or Less	$ .65 ($.60 at Ninth Street)
2 Hours or More	$ .90 (to 3:00 A.M.) at Third Ave. only and $.85 (to 3:00 A.M.) at Ninth St. only.
~~3 Hours or Less~~	~~$ .90 (to 3:00 A.M.) at Third Avenue only.~~
3 Hours or Less	$ .90 at Bigelow Boulevard only.
4 Hours or Less	$ 1.00 at Bigelow Boulevard only.
4 Hours or More	$ 1.25 (to 3:00 A.M.) at Bigelow Boulevard only.
3:00 A.M. to 8:00 A.M.	$ .85 (Maximum) at Ninth Street only.
6:00 P.M. to 8:00 A.M.	$ 1.85 ($1.75 at Ninth Street)
24 Hours Maximum	$ 2.50
Monthly Rate	$39.00

* Rates are fixed by Pittsburgh Parking Authority in consultation with Lessee.

Plaintiffs' Exhibit No. 1

PARKING SERVICE CORPORATION - Contd.

GATEWAY CENTER GARAGE
New Liberty Avenue near Commonwealth Place
RATES EFFECTIVE FEBRUARY 1, 1969

DAY RATE		NIGHT RATE	
Hour	$ .75	1 Hour	$ .75
Hours	$ 1.00	2 Hours	$ 1.00
Hours	$ 1.25	3 Hours	$ 1.25
Hours	$ 1.50	6:00 P.M. to 3:00 A.M.	$ 1.50
Hours	$ 1.75	6:00 P.M. to 8:00 A.M.	$ 2.00
Hours	$ 2.00		
Hours	$ 2.25		
to 12 Hours	$ 2.50		
12 to 16 Hours	$ 2.75		
16 to 24 Hours	$ 3.00		
Weekly Rate	$18.00		
Monthly Rate	$44.00		
Delivery Each Way	$ .50		
School Proms & After Prom Parties	$ 1.25		
Special Hilton Deal	$ 2.25		
Collection In Advance	$ 1.25		

ARENA PARKING, INC.

Plaintiff's Exhibit No. 1

ARENA PARKING INC.

1968, 1969 AND PROJECTED 1970 INCOME AND OPERATING COSTS BY INDIVIDUAL FACILITIES

1968	TUNNEL ST. LOT & GARAGE	FOURTH AVE. GARAGE	TOTAL
PARKING REVENUE	$ 239,819	$ 156,337	$ [illegible]
OPERATING EXPENSE	205,853	160,417	[illegible]
OPERATING INCOME (LOSS)	33,966	(4080)	[illegible]
INCOME AS PERCENT OF REVENUE	14.2%	0	[illegible]
1969			
PARKING REVENUE	232,475	167,017	[illegible]
OPERATING EXPENSE	217,035	153,393	[illegible]
OPERATING INCOME (LOSS)	15,440	13,624	[illegible]
INCOME AS PERCENT OF REVENUE	6.6%	8.2%	[illegible]
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 10%	22,054	20,390	[illegible]
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	9.5%	12.2%	[illegible]
1970 PROJECTION			
PARKING REVENUE	230,821	173,227	[illegible]
OPERATING EXPENSE WITH PARKING TAX AT 20% EFF. 2-1-70	234,346	168,973	[illegible]
OPERATING INCOME (LOSS)	(3525)	4254	[illegible]
INCOME AS PERCENT OF REVENUE	0	2.5%	[illegible]
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 15%	4097	12221	[illegible]
INCOME WITH PARKING TAX OF 15% AS PERCENT OF REVENUE	1.8%	7.1%	[illegible]
OPERATING INCOME (LOSS) IF PARKING WERE 10%	12382	20883	[illegible]
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	5.4%	12.1%	[illegible]

Plaintiffs' Exhibit No. 1 541a

OPERATING STATEMENT FOR: [illegible] PARKING, INC. [illegible] BUILT 1963 AND GARAGE 410 SPACES

	1968	1969	1970 PROJECTION
PARKING REVENUE	$239,819 *	$232,475*	230,.21 *
OPERATING EXPENSE			
1.TAXES			
PARKING	13,778	20,994	32,47[illegible]
REAL ESTATE	31,508	37,169	37,1[illegible]9
PAYROLL	3,720	5,907	[illegible],907
BUSINESS PRIVILEGE		1,440	1,440
OTHER	1,047	441	441
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY			
RENT FOR-OFFICE-ALLOCATED			
AMORTIZATION	10,543	10,585	10,[illegible]85
INTEREST	30,598	35,078	35,078
DEPRECIATION			
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	85,303	72,859	78,[illegible]88
MANAGEMENT FEE			
GROUP INSURANCE	3,391	4,[illegible]92	4,[illegible]92
PENSION EXPENSE	3,504	3,102	3,102
UNIFORM EXPENSE	165		
4.PROFESSIONAL SERVICE:			
AUDITING	1,402	1,[illegible]50	1,[illegible]50
LEGAL			
OTHER			
5.GENERAL INSURANCE	4,087	5,205	5,205
6.MAINTENANCE & REPAIRS	2,792	3,294	3,294
7.MATERIALS & SUPPLIES	756	815	815
8.UNINSURED LOSSES	1,961	2,752	2,752
9.UTILITIES & TELEPHONE	10,228	11,297	11,297
10.MISCELLANEOUS UNALLOCATED EXP	108	25	25
TOTAL OPERATING EXPENSE	205,[illegible]22	217,033	2[illegible],[illegible]34
OPERATING INCOME (LOSS)	[illegible],964	15,442	(3,527)
INCOME AS PERCENT OF REVENUE	14.2	[illegible].6	[illegible].

NOTES: * Includes monthly rental from parking space which is not subject to parking tax. This facility is owned by Arena Parking, Inc.. Note no rent or charge for use of property is included in operating expense.

Plaintiffs' Exhibit No. 1

ARENA PARKING, INC.

OPERATING STATEMENT FOR: FOURTH AVENUE GARAGE 440 SPACES

	1968	1969	1970 PROJECTION
PARKING REVENUE	$154,337	$167,017	$173,727
OPERATING EXPENSE			
1. TAXES			
PARKING	14,689	23,468	23,478
REAL ESTATE	16,340	18,930	18,930
PAYROLL	3,491	3,920	3,920
BUSINESS PRIVILEGE		81	81
OTHER	150		
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY			
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST	11,574	10,452	10,452
DEPRECIATION	4,665	4,665	4,665
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	61,351	63,706	68,000
MANAGEMENT FEE			
GROUP INSURANCE	5,758	5,458	5,458
PENSION EXPENSE	3,820	3,504	3,504
UNIFORM EXPENSE	180		
4. PROFESSIONAL SERVICE			
AUDITING	825	720	720
LEGAL			
OTHER			
5. GENERAL INSURANCE	3,828	3,756	3,756
6. MAINTENANCE & REPAIRS	3,118	3,621	3,621
7. MATERIALS & SUPPLIES	1,076	933	933
8. UNINSURED LOSSES	2,446	1,867	1,867
9. UTILITIES & TELEPHONE	6,988	7,410	7,410
10. MISCELLANEOUS UNALLOCATED EXP	90	114	114
TOTAL OPERATING EXPENSE	140,617	153,393	160,977
OPERATING INCOME (LOSS)	(4,080)	13,624	6,750
INCOME AS PERCENT OF REVENUE	0	8.2	3.9

NOTES: This facility is owned by Arena Parking, Inc. Note no rent or charge for use of the property is included in operating expense.

ARENA PARKING, INC.

PARKING RATES PRESENTLY IN EFFECT
RATES EFFECTIVE FEBRUARY 1, 1969

TUNNEL STREET GARAGE
Tunnel Street near Centre Avenue

DAY RATE		NIGHT RATE	
1 Hour	$ .60	6 P.M. to 3 A.M.	$ 1.00
2 Hours	$ .85	24 Hours Maximum	$ 2.50
3 Hours	$ 1.15	Delivery Charge Each Way	$ .50
$.25 for each additional hour			
Maximum for 24 Hours	$ 2.50		
Monthly Rate (In and Out)	$33.50		

TUNNEL STREET LOT
Tunnel Street at Bigelow Boulevard

DAY RATE		NIGHT RATE	
1 Hour	$ .60	6 P.M. to 3 A.M.	$ 1.00
2 Hours	$ .85		
3 Hours	$ 1.15		
$.25 for each additional hour			
Maximum for 24 Hours	$ 2.50		

FOURTH AVENUE GARAGE
Fourth Avenue at P-C R. R.

DAY RATE		NIGHT RATE	
1 to 2 Hours	$ .75	Overnight Parking	$ 2.00
2 to 4 Hours	$ 1.00		
4 to 6 Hours	$ 1.25		
6 to 8 Hours	$ 1.50		
8 to 10 Hours	$ 1.75		
10 to 24 Hours	$ 2.00		
Monthly Parking	$31.00		
Weekly Rate	$11.50		

Plaintiffs' Exhibit No. 1

FOURTH AVENUE PARKING, INC.

FOURTH AVE. PARKING INC.

1968, 1969 AND PROJECTED 1970 INCOME AND OPERATING COSTS BY INDIVIDUAL FACILITIES

1968	CIVIC ARENA LOTS	MELODY TENT LOT	TOTAL
PARKING REVENUE	$ 358,731	$ 43,977	$ 402,708
OPERATING EXPENSE	370,318	39,343	409,622
OPERATING INCOME (LOSS)	(11,587	4,634	(6,954)
INCOME AS PERCENT OF REVENUE	0	10.5 %	0
1969			
PARKING REVENUE	410,211	71,083	481,294
OPERATING EXPENSE	408,309	61,480	469,789
OPERATING INCOME (LOSS)	1,902	9,603	11,505
INCOME AS PERCENT OF REVENUE	0.5 %	13.5 %	2.4%
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 10%	21,029	12,965	33,994
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	5.1%	18.2 %	7.1%
1970 PROJECTION			
PARKING REVENUE	458,972	91,992	550,964
OPERATING EXPENSE WITH PARKING TAX AT 20% EFF. 2-1-70	460,150	74,688	534,838
OPERATING INCOME (LOSS)	(1,178)	17,304	16,126
INCOME AS PERCENT OF REVENUE	0	18.8 %	2.9%
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 15%	19,935	21,535	41,470
INCOME WITH PARKING TAX OF 15% AS PERCENT OF REVENUE	43.1 %	23.4%	7.5%
OPERATING INCOME (LOSS) IF PARKING WERE 10%	42,884	26,135	69,019
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	9.3 %	28.4%	12.5%

Plaintiffs' Exhibit No. 1

FOURTH AVE. PARKING, INC.

OPERATING STATEMENT FOR: CIVIC ARENA LOTS 1028 SPACES

	1968	1969	1970 PROJECTION
PARKING REVENUE	$358,731	$410,211	$453,972
OPERATING EXPENSE			
1. TAXES			
PARKING	35,873	60,148	89,59[illegible]
REAL ESTATE			
PAYROLL	3,[illegible]97	3,211	3,211
BUSINESS PRIVILEGE		446	2,150
OTHER	180	210	210
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	251,597	272,367	287,63[illegible]
RENT FOR OFFICE - ALLOCATED	2,400	2,400	2,400
AMORTIZATION			
INTEREST		5	5
DEPRECIATION	42	42	42
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	61,736	59,632	63,377
MANAGEMENT FEE			
GROUP INSURANCE	2,338	1,930	1,930
PENSION EXPENSE	1,272	936	936
UNIFORM EXPENSE	241	245	245
4. PROFESSIONAL SERVICE:			
AUDITING	875	750	750
LEGAL	1,200	1,200	1,200
OTHER			
5. GENERAL INSURANCE	4,219	4,009	4,009
6. MAINTENANCE & REPAIRS	847	688	688
7. MATERIALS & SUPPLIES	2,463	805	805
8. UNINSURED LOSSES	324	16	16
9. UTILITIES & TELEPHONE			
10. MISCELLANEOUS UNALLOCATED EXP	1,164	219	219
TOTAL OPERATING EXPENSE	370,319	408,309	460,150
OPERATING INCOME (LOSS)	(11,588)	1,902	(1,178)
INCOME AS PERCENT OF REVENUE	0	0.5	

NOTES

FOURTH AVE. PARKING, INC.

OPERATING STATEMENT FOR: MELODY TENT LOT 1000 SPACES

	1968	1969	1970 PROJECTION
PARKING REVENUE	$ 43,977	$ 71,083	$ 91,952
OPERATING EXPENSE			
1.TAXES			
PARKING	4,358	10,470	18,030
REAL ESTATE			
PAYROLL	632	940	940
BUSINESS PRIVILEGE		97	126
OTHER			
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	22,747	26,027	25,991
RENT FOR OFFICE-ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION			
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	10,720	16,680	18,011
MANAGEMENT FEE			
GROUP INSURANCE		469	469
PENSION EXPENSE		312	312
UNIFORM EXPENSE			
4.PROFESSIONAL SERVICE:			
AUDITING		125	125
LEGAL			
OTHER			
5.GENERAL INSURANCE	401	751	751
6.MAINTENANCE & REPAIRS	83	4,688	4,688
7.MATERIALS & SUPPLIES	153	762	762
8.UNINSURED LOSSES	74	75	75
9.UTILITIES & TELEPHONE			
10.MISCELLANEOUS UNALLOCATED EXP	135	55	55
TOTAL OPERATING EXPENSE	39,343	51,481	74,668
OPERATING INCOME (LOSS)	4,634	9,602	17,324
INCOME AS PERCENT OF REVENUE	10.5	13.5	18.8
NOTES:			

Plaintiffs' Exhibit No. 1

FOURTH AVENUE PARKING, INC.

PARKING RATES PRESENTLY IN EFFECT
RATES EFFECTIVE FEBRUARY 1, 1969

CIVIC ARENA LOTS
Adjacent to the Public Auditorium

NORTH & SOUTH LOTS

DAY RATE		NIGHT RATE	
7:00 A. M. to 6 P.M.	$ 1.00	6 P.M. to Midnight (Non-event)	$ 1.00
		SPECIAL EVENTS	$ 1.25

EAST LOT

DAY RATE		NIGHT RATE	
7:00 A. M. to 6 P.M.	$ .75	6 P.M. to Midnight (Non-event)	$ 1.00
		SPECIAL EVENTS	$ 1.25

WEST LOT

DAY RATE		NIGHT RATE
EXHIBITORS	$ 1.00	
PUBLIC PARKING	$ 1.25	

MELODY TENT LOT
Between Centre & Bedford Avenues
East of the Public Auditorium

DAY RATE		NIGHT RATE	
7:00 A.M. to 6 P.M.	$ .50	6 P.M. to Midnight	$ .85
Truck & Bus Rate	$ 1.00	Truck & Bus Rate	$ 1.50
		SPECIAL EVENTS	$ .85

WILLIAM PENN PARKING GARAGE, INC.

Plaintiffs' Exhibit No.1

WILLIAM PENN PARKING GARAGE INC.

1968,1969 AND PROJECTED 1970 INCOME AND OPERATING COSTS BY INDIVIDUAL FACILITIES

1968	PLAZA LOT
PARKING REVENUE	46,793
OPERATING EXPENSE	30,653
OPERATING INCOME (LOSS)	16,140
INCOME AS PERCENT OF REVENUE	34.5%
1969	
PARKING REVENUE	127,374
OPERATING EXPENSE	133,389
OPERATING INCOME (LOSS)	(6,015)
INCOME AS PERCENT OF REVENUE	0
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 10%	121
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	0
1970 PROJECTION	
PARKING REVENUE	130,613
OPERATING EXPENSE WITH PARKING TAX AT 20% EFF. 2-1-70	135,997
OPERATING INCOME (LOSS)	(5,384)
INCOME AS PERCENT OF REVENUE	0
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 15%	624
INCOME WITH PARKING TAX OF 15% AS PERCENT OF REVENUE	0.5%
OPERATING INCOME (LOSS) IF PARKING WERE 10%	7,155
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	5.5%

WILLIAM PENN PARKING GARAGE, INC.

OPERATING STATEMENT FOR: PLAZA LOT 176 SPACES

	1968	1969*	1970 PROJECTION
PARKING REVENUE	$ 46,753	$127,374	$130,613
OPERATING EXPENSE			
1.TAXES			
PARKING	4,493	18,631	25,600
REAL ESTATE		72,030	65,000
PAYROLL	364	1,920	1,920
BUSINESS PRIVILEGE		293	293
OTHER	30		
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	11,292		
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION			
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	6,289	33,365	36,034
MANAGEMENT FEE			
GROUP INSURANCE		433	433
PENSION EXPENSE		264	264
UNIFORM EXPENSE			
4.PROFESSIONAL SERVICE:			
AUDITING	1,825		
LEGAL			
OTHER			
5.GENERAL INSURANCE		845	845
6.MAINTENANCE & REPAIRS	1,562	315	315
7.MATERIALS & SUPPLIES	2,542	3,491	3,491
8.UNINSURED LOSSES	539	1,165	1,165
9.UTILITIES & TELEPHONE	1,490	261	261
10.MISCELLANEOUS UNALLOCATED EXP.	229	386	386
TOTAL OPERATING EXPENSE	30,653	133,399	135,997
OPERATING INCOME (LOSS)	16,140	(6,015)	(5,384)
INCOME AS PERCENT OF REVENUE	34.5	0	0

NOTES: *Operations expanded in 1969

Lessee pays Real Estate Taxes in lieu of Rent

These were $72,000.00 in 1969 and will be $65,000.00 in 1970

Plaintiffs' Exhibit No. 1

WILLIAM PENN PARKING GARAGE, INC.

PARKING RATES PRESENTLY IN EFFECT
RATES EFFECTIVE FEBRUARY 1, 1969

PLAZA LOT
6th Avenue and Centre Avenue

AY RATE - - - - - - - - - - - - - - - - - $1.60 NIGHT RATE - - - - - - - - - $1

CAMPUS PARKING, INC.

Plaintiffs' Exhibit No. 1

CAMPUS PARKING INC.

1968, 1969 AND PROJECTED 1970 INCOME AND OPERATING COSTS BY INDIVIDUAL FACILITIES

	O'HARA ST. GARAGE
1968	
PARKING REVENUE	$ 175,662
OPERATING EXPENSE	175,927
OPERATING INCOME (LOSS)	(256)
INCOME AS PERCENT OF REVENUE	0
1969	
PARKING REVENUE	156,181
OPERATING EXPENSE	156,619
OPERATING INCOME (LOSS)	(438)
INCOME AS PERCENT OF REVENUE	0
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 10%	6,762
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	4.3 %
1970 PROJECTION	
PARKING REVENUE	146,136
OPERATING EXPENSE WITH PARKING TAX AT 20% EFF. 2-1-70	165,184
OPERATING INCOME (LOSS)	(19,048)
INCOME AS PERCENT OF REVENUE	0
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 15%	(12,325)
INCOME WITH PARKING TAX OF 15% AS PERCENT OF REVENUE	0
OPERATING INCOME (LOSS) IF PARKING WERE 10%	(5,019)
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	0

CAMPUS PARKING, INC. 550 SPACES

OPERATING STATEMENT FOR: O'HARA ST. GARAGE (UNIV. OF PITTSBURGH)

	1968	1969	1970 PROJECTION
PARKING REVENUE	$175,662	$156,181	$166,136
OPERATING EXPENSE			
1.TAXES			
PARKING	17,566	22,818	28,643
REAL ESTATE			
PAYROLL	1,935	1,970	1,970
BUSINESS PRIVILEGE			
OTHER	7	7	7
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	102,300	79,736	79,736
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION			
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	32,127	34,253	36,993
MANAGEMENT FEE			
GROUP INSURANCE	1,927	1,753	1,753
PENSION EXPENSE	1,272	972	972
UNIFORM EXPENSE	237	135	135
4.PROFESSIONAL SERVICE:			
AUDITING			
LEGAL			
OTHER			
5.GENERAL INSURANCE	2,013	2,390	2,390
6.MAINTENANCE & REPAIRS	6,784	6,663	6,663
7.MATERIALS & SUPPLIES	1,193	1,072	1,072
8.UNINSURED LOSSES			
9.UTILITIES & TELEPHONE	8,551	4,716	4,716
10.MISCELLANEOUS UNALLOCATED EXP.	15	96	96
TOTAL OPERATING EXPENSE	175,927	156,619	165,194
OPERATING INCOME (LOSS)	(265)	(438)	(19,058)
INCOME AS PERCENT OF REVENUE	0	0	0

NOTES:

Campus Parking, Inc. pays no Business Privilege Tax as it has no income.
University of Pittsburgh does not pay it as it claims to be exempt.

Plaintiffs' Exhibit No. 1

CAMPUS PARKING, INC.

PARKING RATES PRESENTLY IN EFFECT*
RATES EFFECTIVE 1968

O'HARA ST. GARAGE
O'HARA STREET NEAR DESOTA ST.

1 Hour	$ .40
2 Hours	.60
3 Hours	.75
4 Hours	.90
5 Hours	$ 1.05
6 to 11 Hours	$ 1.15
12 Hours	$ 1.30
13 Hours	$ 1.45
14 Hours	$ 1.60
15 to 24 Hours	$ 1.75
OFFICIAL EVENTS	$ 1.00

HOSPITAL RATES
(After 6 P.M.)

3 Hours or Less	$ .35
4 Hours	.50
5 Hours	.65
6 Hours	.85
7 Hours	.95
8 Hours	$ 1.10
9 Hours	$ 1.25

*Rates are established by the University of Pittsburgh

GRANT PARKING, INC.

1.

Plaintiffs' Exhibit No. 1

GRANT PARKING, INC.

OPERATING STATEMENT FOR: GRANT-SHEFFIELD LOTS - 300 Series

	1968	1969	1970 PROJECTED
PARKING REVENUE	$281,822	$282,895	$288,570
OPERATING EXPENSE			
1. TAXES			
PARKING	38,165	41,257	42,782
REAL ESTATE			
PAYROLL	5,151	4,226	4,226
BUSINESS PRIVILEGE		1,697	1,697
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	154,213	181,266	208,178
RENT FOR OFFICE - ALLOCATED	1,488	1,500	1,500
AMORTIZATION			
INTEREST			
DEPRECIATION	78	83	83
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	75,027	74,481	80,439
MANAGEMENT FEE & EXPENSES	7,150	7,715	7,715
GROUP INSURANCE	771	3,988	3,988
PENSION EXPENSE			
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING	1,200	1,200	1,200
LEGAL	915	720	720
OTHER			
5. GENERAL INSURANCE	3,870	4,064	4,064
6. MAINTENANCE & REPAIRS	2,586	1,645	1,645
7. MATERIALS & SUPPLIES	480	1,411	1,411
8. UNINSURED LOSSES	1,110	623	623
9. UTILITIES & TELEPHONE	1,055	1,075	1,075
10. MISCELLANEOUS UNALLOCATED EXP.	1,428	1,335	1,335
TOTAL OPERATING EXPENSE	$283,687	$328,287	$367,681
OPERATING INCOME (LOSS)	(1,865)	(45,462)	(67,428)
INCOME AS PERCENT OF REVENUE	-0-	-0-	-0-

NOTES: Grant Parking, Inc. operates these lots for Grant Building Corporation Lessee under a Management Agreement for a fixed fee. Any profit or loss goes to or is borne by the Lessee.

GRANT PARKING, INC.

OPERATING STATEMENT FOR: OLIVER PLAZA GARAGE & LOT - 342 Spaces

	1968*	1969*	1970 PROJECTION
PARKING REVENUE	$73,127	$214,628	$282,923
OPERATING EXPENSE			
1.TAXES			
PARKING	7,313	31,485	55,453
REAL ESTATE			
PAYROLL	1,182	2,768	2,768
BUSINESS PRIVILEGE			
OTHER	39		
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	35,966	112,221	150,963
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION	27	153	153
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	15,767	48,538	52,421
MANAGEMENT FEE	3,928	6,935	8,400
GROUP INSURANCE	399	2,698	2,698
PENSION EXPENSE			
UNIFORM EXPENSE	399	1,170	1,170
4.PROFESSIONAL SERVICE:			
AUDITING	400	750	750
LEGAL			
OTHER			
5.GENERAL INSURANCE	144	2,219	2,219
6.MAINTENANCE & REPAIRS	833	2,370	2,370
7.MATERIALS & SUPPLIES	1,180	1,013	1,013
8.UNINSURED LOSSES		838	838
9.UTILITIES & TELEPHONE	179	14	14
10.MISCELLANEOUS UNALLOCATED EXP.	5,342	1,043	1,043
TOTAL OPERATING EXPENSE	$73,098	$214,217	$262,273
OPERATING INCOME (LOSS)	29	411	650
INCOME AS PERCENT OF REVENUE	-0-	0.2	0.2

NOTES: * Operation of Oliver Plaza Garage started about midyear 1968 and the operation of the lot started about a year later.

Grant Parking, Inc. operates these facilities for Oliver Terrace Corp., Owner under a Management Agreement for a fixed fee, and any profit or loss goes to or is borne by the Owner.

560a Plaintiffs' Exhibit No. 1

GRANT PARKING, INC.

OPERATING STATEMENT FOR: LIBERTY AVENUE LOTS 290 Spaces

	1968	1969	1970 PROJECTION
PARKING REVENUE	$130,948	$154,385	$175,401
OPERATING EXPENSE			
1. TAXES			
PARKING	13,094	22,604	34,379
REAL ESTATE			
PAYROLL	2,207	2,258	2,258
BUSINESS PRIVILEGE			
OTHER	6	288	926
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	72,468	80,322	80,322
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION	227	227	227
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	33,463	44,626	49,096
MANAGEMENT FEE			
GROUP INSURANCE	333	1,697	1,697
PENSION EXPENSE			
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING		150	150
LEGAL			
OTHER			
5. GENERAL INSURANCE	1,528	2,296	2,296
6. MAINTENANCE & REPAIRS	142	1,342	1,342
7. MATERIALS & SUPPLIES	778	1,046	1,046
8. UNINSURED LOSSES	56	1,033	1,033
9. UTILITIES & TELEPHONE	507	543	543
10. MISCELLANEOUS UNALLOCATED EXP.	103	552	552
TOTAL OPERATING EXPENSE	124,912	158,984	174,867
OPERATING INCOME (LOSS)	6,036	(4,599)	534
INCOME AS PERCENT OF REVENUE	4.6	0	0.1

NOTES:

GRANT PARKING, INC.

PARKING RATES PRESENTLY IN EFFECT

GRANT-SMITHFIELD LOTS
Grant at Third, Forbes, Smithfield and Fourth Avenue

RATES EFFECTIVE FEBRUARY 3, 1970

DAY RATES		NIGHT RATES	
1 Hour	$ .75	After 6:00 P.M.	$ .75
2 Hours	$ 1.00		
.25 for each Additional Hour			
Maximum	$ 3.00		
Monthly	$40.00		

OLIVER PLAZA GARAGE
Oliver Plaza #1 Building

RATES EFFECTIVE MARCH 1, 1969

DAY RATES		NIGHT RATES	
1 Hour	$ .85	After 6:00 P.M.	$ .85
2 Hours	$ 1.10	Maximum	$ 1.10
3 Hours	$ 1.40		
4 Hours	$ 1.65		
.25 for each Additional Hour			
Maximum	$ 3.15		

OLIVER PLAZA LOT
Liberty Avenue and Oliver Avenue

RATES EFFECTIVE JUNE 30, 1969

DAY RATES		NIGHT RATES	
1 Hour	$ .75	After 6:00 P.M.	$ 3.00
2 Hours	$ 1.00		
.25 for each Additional Hour			
Maximum	$ 3.00		

Plaintiffs' Exhibit No. 1

GRANT PARKING, INC. - Contd.

LIBERTY AVENUE LOTS
Lot on Liberty Avenue near 11th Street

RATES EFFECTIVE 1969

DAY RATES		NIGHT RATES	
1 Hour	$ .70	1 Hour (After 6:00 P.M.)	$
2 Hours	$ .85	Maximum	$1.
3 Hours	$ 1.15	Saturday - All Day	$1.
4 Hours	$ 1.40		
5 Hours	$ 1.65		
6 Hours	$ 1.90		
7 to 12 Hours	$ 2.15		
12 to 24 Hours	$ 2.50		

PITT-PENN LOT
Penn Avenue and 11th Street

RATES EFFECTIVE SEPTEMBER 1, 1969

DAY RATES		NIGHT RATES	
All Day	$ 1.60	After 6:00 P.M.	$
		Saturday - All Day	$1.

SMALLMAN STREET LOT
13th Street near Smallman Street

RATES EFFECTIVE SEPTEMBER 1, 1969

DAY RATES		NIGHT RATES
All Day	$ .90	

STAMIX AUTOPARK

STANWIX AUTOPARK

1968, 1969 AND PROJECTED 1970 INCOME AND OPERATING COSTS BY INDIVIDUAL FACILITIES

	STANWIX GARAGE	FIRST AVE. LOT	QUIK-PARK LOT	TOTALS FOR OWNED OR LEASED FACILITIES	FT. DUQUESNE -6th ST. GARAGE (1)	SMITHFIELD LIBERTY GARAGE (2)
1968						
PARKING REVENUE	$ 513,057	$ 32,820	$ 71,171	$ 617,048	$ 446355	$ 482,022
OPERATING EXPENSE	434,419	43,456	64,042	541,917	472,562	375,909
OPERATING INCOME (LOSS)	78,638	(10,636)	7,129	75,131	(24,207)	106,113
INCOME AS PERCENT OF REVENUE	15.3%	0	10.0%	12.2%	0	22.0%
1969						
PARKING REVENUE	522,476	27,688	75,124	625,288	574,165	507,519
OPERATING EXPENSE	482,699	57,448	70,592	610,739	609,094	409,375
OPERATING INCOME (LOSS)	39,777	(29,760)	4,532	14,549	(34,929)	98,144
INCOME AS PERCENT OF REVENUE	7.6%	0	6.0%	2.3%	0	19.3%
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 10%	63,694	(29,530)	7,973	43,137	(8,283)	121,311
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	12.2%	0	10.6%	6.9%	0	24.9%
1970 PROJECTION						
PARKING REVENUE	539,558	26,377	72,960	638,895	635,579	510,595
OPERATING EXPENSE WITH PARKING TAX AT 20% EFF. 2-1-70	517,291	59,562	76,276	652,499	650,729	441,860
OPERATING INCOME (LOSS)	22,114	(33,185)	(3,316)	(13,604)	(15,150)	68,715
INCOME AS PERCENT OF REVENUE	4.1%	0	0	0	0	13.5%
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 15%	46,933	(31,972)	670	15,631	14,086	92,199
INCOME WITH PARKING TAX OF 15% AS PERCENT OF REVENUE	8.7%	0	0.9%	2.4%	2.2%	18.1%
OPERATING INCOME (LOSS) IF PARKING WERE 10%	73,911	(29,440)	4,318	48,789	45,865	117,730
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	13.7%	0	5.9%	7.6%	7.2%	23.1%

(1) OPERATED FOR JOSEPH HORNE CO. FOR A FEE.
(2) OPERATED FOR GIMBELS FOR A FEE

STAMVIX AUTOPARK

OPERATING STATEMENT FOR: STAMVIX GARAGE 572 SPACES

	1968	1969	1970 PROJECTION
PARKING REVENUE	$513,057	$588,476	$599,598
OPERATING EXPENSE			
1.TAXES			
PARKING	98,306	76,163	105,253
REAL ESTATE	80,988	96,014	96,014
PAYROLL *			
BUSINESS PRIVILEGE		2,988	3,135
OTHER			
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY			
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION	58,192	53,472	53,478
INTEREST	149,130	148,997	148,997
DEPRECIATION			
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	56,688	62,550	67,554
MANAGEMENT FEE			
GROUP INSURANCE			
PENSION EXPENSE			
UNIFORM EXPENSE			
4.PROFESSIONAL SERVICE:			
AUDITING			
LEGAL			
OTHER			
5.GENERAL INSURANCE	3,867	4,684	4,684
6.MAINTENANCE & REPAIRS	8,766	9,553	9,553
7.MATERIALS & SUPPLIES			
8.UNINSURED LOSSES			
9.UTILITIES & TELEPHONE	7,317	8,188	8,188
10.MISCELLANEOUS UNALLOCATED EXP.	17,165	20,100	20,100
TOTAL OPERATING EXPENSE	434,419	488,699	517,444
OPERATING INCOME (LOSS)	78,638	39,777	22,114
INCOME AS PERCENT OF REVENUE	15.3	7.6	4.1

NOTES: * Payroll taxes are included in the wages and salaries figures.

Plaintiffs' Exhibit No. 1

STAMPIX AUTOPARK

OPERATING STATEMENT FOR: FIRST AVENUE LOT 76 SPACES

	1968	1969	1970 PROJECTION
PARKING REVENUE	$ 32,820	$ 27,648	$ 28,377
OPERATING EXPENSE			
1. TAXES			
PARKING	3,282	4,026	5,179
REAL ESTATE	9,504	6,342	6,342
PAYROLL *			
BUSINESS PRIVILEGE		181	181
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY		23,442	23,442
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST	15,168	8,000	8,000
DEPRECIATION	734	734	734
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	11,474	12,125	13,095
MANAGEMENT FEE			
GROUP INSURANCE			
PENSION EXPENSE			
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING			
LEGAL			
OTHER			
5. GENERAL INSURANCE	133	172	172
6. MAINTENANCE & REPAIRS	821	181	181
7. MATERIALS & SUPPLIES			
8. UNINSURED LOSSES			
9. UTILITIES & TELEPHONE	181	208	208
10. MISCELLANEOUS UNALLOCATED EXP.	2,159	2,037	2,037
TOTAL OPERATING EXPENSE	43,456	57,448	59,440
OPERATING INCOME (LOSS)	(10,636)	(29,760)	(31,063)
INCOME AS PERCENT OF REVENUE	0	0	0

NOTES:

* Payroll taxes are included in the wages and salaries figures.

STANDLY AUTOPARK

OPERATING STATEMENT FOR: QUIK PARK LOT - 44th AVENUE 81 SPACES

	1968	1969	1970 PROJECTION
PARKING REVENUE	$ 71,171	$ 75,124	$ 79,960
OPERATING EXPENSE			
1.TAXES			
PARKING	7,115	10,953	14,389
REAL ESTATE			
PAYROLL *			
BUSINESS PRIVILEGE		399	451
OTHER			
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	36,018	36,895	36,985
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION	286	196	196
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	18,898	20,688	22,343
MANAGEMENT FEE			
GROUP INSURANCE			
PENSION EXPENSE			
UNIFORM EXPENSE			
4.PROFESSIONAL SERVICE:			
AUDITING			
LEGAL			
OTHER			
5.GENERAL INSURANCE	189	208	208
6.MAINTENANCE & REPAIRS	993	990	990
7.MATERIALS & SUPPLIES			
8.UNINSURED LOSSES			
9.UTILITIES & TELEPHONE	367	394	394
10.MISCELLANEOUS UNALLOCATED EXP.	176	469	469
TOTAL OPERATING EXPENSE	64,042	70,598	76,826
OPERATING INCOME (LOSS)	7,129	4,538	(3,316)
INCOME AS PERCENT OF REVENUE	10.0	6.0	0

NOTES:

* Payroll taxes are included in the wages and salaries figures.

Plaintiffs' Exhibit No. 1

STANWIX AUTOPARK — 938 SPACES

OPERATING STATEMENT FOR: FT. DUQUESNE – 4th ST. GARAGE (LEASED)

	1968	1969	INTO PROJECTION
PARKING REVENUE	448,355	574,165	575,570
OPERATING EXPENSE			
1. TAXES			
PARKING	44,835	84,063	124,77
REAL ESTATE			
PAYROLL *			
BUSINESS PRIVILEGE		2,466	3,44
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	301,441	379,110	382,12
RENT FOR OFFICE – ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION			9,12
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	80,292	87,075	94,81
MANAGEMENT FEE	7,170	15,328	15,32
GROUP INSURANCE			
PENSION EXPENSE			
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING			
LEGAL			
OTHER			
5. GENERAL INSURANCE	4,786	3,285	3,28
6. MAINTENANCE & REPAIRS	11,353	15,124	15,12
7. MATERIALS & SUPPLIES	2,831	4,568	4,56
8. UNINSURED LOSSES			
9. UTILITIES & TELEPHONE	17,803	19,682	19,68
10. MISCELLANEOUS UNALLOCATED EXP.	1,851	1,393	1,39
TOTAL OPERATING EXPENSE	472,562	609,094	659,39
OPERATING INCOME (LOSS)	(24,207)	(34,929)	(15,12
INCOME AS PERCENT OF REVENUE	0	0	0

NOTES: Garage is owned by the Parking Authority and is exempt from City, County and School Real Estate taxes. Capacity of garage increased from 60 to 9 spaces in Nov. 1968.

* Payroll taxes are included in the wages and salaries figures. Garage is operated by Stanwix Autopark for Jos. Horne Co., Lessee, for a fee. Any profit or loss goes to or is borne by lessee.

STANWIX AUTOPARK 618 SPACES

OPERATING STATEMENT FOR: SMITHFIELD - LIBERTY GARAGE (GIMBELS)

	1968	1969	1970 PROJECTION
PARKING REVENUE	$[illegible]	6507,519	8518,575
OPERATING EXPENSE			
1.TAXES			
PARKING	48,283	73,919	100,073
REAL ESTATE			
PAYROLL *			
BUSINESS PRIVILEGE		2,621	3,045
OTHER			
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	210,308	211,988	211,988
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION			
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	72,284 *	73,843 *	79,750 *
MANAGEMENT FEE	7,500	9,321	9,321
GROUP INSURANCE			
PENSION EXPENSE			
UNIFORM EXPENSE			
4.PROFESSIONAL SERVICE:			
AUDITING			
LEGAL	1,050	1,000	1,000
OTHER			
5.GENERAL INSURANCE	3,762	3,858	3,858
6.MAINTENANCE & REPAIRS	10,865	9,101	9,101
7.MATERIALS & SUPPLIES	3,399	4,516	4,516
8.UNINSURED LOSSES			
9.UTILITIES & TELEPHONE	11,121	11,830	11,830
10.MISCELLANEOUS UNALLOCATED EXP.	7,397	7,378	7,378
TOTAL OPERATING EXPENSE	375,909	409,375	441,860
OPERATING INCOME (LOSS)	106,113	98,144	68,715
INCOME AS PERCENT OF REVENUE	22.0	19.3	13.5

NOTES: * Payroll taxes are included in the Wages & Salaries figures. Garage is owned by the Parking Authority and is exempt from payment of City, County and School Real Estate Taxes. Garage is operated by Stanwix Autopark for Gimbels, Lessee for a fee. Any profit or loss goes to, or is borne by, Lessee.

Plaintiffs' Exhibit No. 1

STANWIX AUTO PARK

PARKING RATES PRESENTLY IN EFFECT

STANWIX GARAGE
Stanwix Street & Ft. Duquesne Blvd.
RATES EFFECTIVE JAN. 1969

DAY RATES		NIGHT RATES (5 P. M. to 8:00 A.M.)	
1 Hour	$ .75	1 Hour	$
2 Hours	$ 1.00	2 Hours	
25¢ For Each Additional Hour		Maximum	$1
Maximum	$ 3.00		

FIRST AVENUE LOT
325 Ft. Pitt Blvd.
RATES EFFECTIVE JUNE 1969

1 Hour	$ .75	NO NIGHT RATES
2 Hours	$ 1.25	
3 Hours	$ 1.75	
4 Hours	$ 2.00	
Maximum	$ 2.00	

STANMIX AUTO PARK - Contd.

KWIK PARK LOT
343 Fourth Ave.
RATES EFFECTIVE JAN. 1969

DAY RATES

1/2 Hour	$ .40
1 Hour	$ .75
1-1/2 Hours	$ 1.10
2 Hours	$ 1.45
50¢ for each Additional Half Hour	
Maximum	$ 5.65

NIGHT RATES
(5 P.M. to Midnight)

1/2 Hour	$ .50
1 Hour	$ .75 Max.

SATURDAY RATES

1 Hour	$ .50
2 Hours	$1.00
50¢ for Each Additional Hour	
Maximum	$4.00

NIGHT RATE

Maximum	$ .75

Plaintiffs' Exhibit No. 1

STANWIX AUTO PARK - Contd.

PARKING RATES PRESENTLY IN EFFECT*

FT. DUQUESNE-SIXTH ST. GARAGE
Ft. Duquesne Blvd. at Sixth St.
RATES EFFECTIVE FEB. 1, 1970

DAY RATES (8 A.M. - 6 P.M.)		NIGHT RATES (6 P.M. - 8 A.M.)	
1 Hour or Less	$ .30	1 Hour or Less	$ .3
2 Hours or Less	$ .50	2 Hours or Less	$ .5
3 Hours or Less	$ .70	3 Hours or Less	$ .7
4 Hours or Less	$ .95	4 Hours or Less	$ .9
5 Hours or Less	$ 1.35	4 Hours or More - to 2 A.M.	$ 1.3
6 Hours or Less	$ 1.65	6 P.M. - 8 A.M.	$ 1.5
7 Hours or Less	$ 1.75	24 Hours - Maximum	$ 1.4
8 Hours or Less	$ 1.95	Monthly Rate	$19.0
9 Hours or Less	$ 2.05		
10 Hours or Less	$ 2.30		
11 Hours or Less	$ 2.35		
12 Hours or Less	$ 2.45		
13 - 24 Hours - Maximum	$ 2.45		

* Rates are fixed by Pittsburgh Parking Authority in consultation with Lessee.

STANWIX AUTO PARK - Contd.

PARKING RATES PRESENTLY IN EFFECT*

SMITHFIELD - LIBERTY GARAGE
Smithfield St. & Liberty Ave.
Near 7th Avenue
RATES EFFECTIVE FEB. 1, 1970

DAY RATES (8 A.M. - 6 P.M.)		NIGHT RATES (6 P.M. - 8 A.M.)	
1 Hour or Less	$ .25	1 Hour or Less	$ .25
2 Hours or Less	$ .40	2 Hours or Less	$ .40
3 Hours or Less	$ .60	3 Hours or Less	$ .60
4 Hours or Less	$ .85	4 Hours or Less	$ .85
5 Hours or Less	$ 1.25	4 Hours or More - to 2 A.M.	$ 1.00
6 Hours or Less	$ 1.75	6 P.M. - 8 A.M.	$ 1.50
7 Hours or Less	$ 2.25	24 Hours Maximum	$ 3.50
25¢ Each Additional Hour To For 12 Hours or Less	$ 3.50	Sunday - 9 A.M. - 1 P.M.	$ .25
13 - 24 Hours - Maximum	$ 3.50	No Monthly Rate	

* Rates are fixed by Pittsburgh Parking Authority in consultation with Lessee.

Plaintiffs' Exhibit No. 1

LIBERTY PARKING

LIBERTY PARKING

1968, 1969 AND PROJECTED 1970 INCOME AND OPERATING COSTS BY INDIVIDUAL FACILITIES

1968	PENN AVE. & EIGHTH ST. LOTS (2)	PENN AVE. & SEVENTH ST. LOT	SEVENTH ST. LOT (NEAR PENN)	LIBERTY AVE. LOT	BLVD. OF ALLIES LOT	BROAD & ANSLEY LOT (E. LIBERTY)	N. HIGHLAND & PENN CIRCLE LOT (E. LIBERTY)	TOTAL ALL LOTS
PARKING REVENUE	$ 42,902	$ 30,300		$ 14,461	$ 11,885	$ 20,444		$ 119,992
OPERATING EXPENSE	51,402	30,689		16,113	18,012	14,641		130,857
OPERATING INCOME (LOSS)	(8500)	(389)		(1652)	(6127)	5803		(10,865)
INCOME AS PERCENT OF REVENUE	0	0		0	0	28.4%		0
1969			LOT ACQUIRED IN JAN. 1969				LOT OPENED IN MAR. 1969	
PARKING REVENUE	39,364	21,804	14,386	13,973	12,773	19,888	23,062	145,250
OPERATING EXPENSE	52,174	28,099	15,290	15,492	20,865	11,302	26,222	169,444
OPERATING INCOME (LOSS)	(12810)	(6295)	(904)	(1519)	(8092)	8586	(3160)	(24194)
INCOME AS PERCENT OF REVENUE	0	0	0	0	0	43.2%	0	0
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 10%	(11009)	(5319)	(259)	(879)	(7504)	9503	(2007)	(17474)
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	0	0	0	0	0	47.8%	0	0
1970 PROJECTION								
PARKING REVENUE	37,666	20,925	13,603	17,632	10,518	17,275	28,761	146,380
OPERATING EXPENSE WITH PARKING TAX AT 20% EFF. 2-1-70	54,780	29,535	18,822	17,863	21,634	11,811	33,841	188,286
OPERATING INCOME (LOSS)	(17114)	(8610)	(5219)	(231)	(11116)	5464	(5080)	(41,906)
INCOME AS PERCENT OF REVENUE	0	0	0	0	0	31.6%	0	0
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 15%	(15,381)	(7648)	(4593)	580	(10,632)	6258	(3757)	(35,173)
INCOME WITH PARKING TAX OF 15% AS PERCENT OF REVENUE	0	0	0	3.3%	0	36.2%	0	0
OPERATING INCOME (LOSS) IF PARKING WERE 10%	(13,498)	(6517)	(3913)	1471	(10,106)	7122	(2319)	(27,760)
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	0	0	0	8.3%	0	41.2%	0	0

LIBERTY PARKING

OPERATING STATEMENT FOR: Penn Avenue & Eighth Street-2 Lots - 78 Spaces

	1968	1969	1970 PROJECTED
PARKING REVENUE	$42,902	$19,264	$37,666
OPERATING EXPENSE			
1. TAXES			
PARKING	4,230	5,737	7,383
REAL ESTATE			
PAYROLL	726	661	661
BUSINESS PRIVILEGE		189	202
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	30,075	30,300	30,300
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST	79	100	100
DEPRECIATION	131	132	132
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	12,970	12,634	13,665
MANAGEMENT FEE			
GROUP INSURANCE			
PENSION EXPENSE	1,409	1,226	1,226
UNIFORM EXPENSE	113	4	4
4. PROFESSIONAL SERVICE:			
AUDITING	200	250	250
LEGAL			
OTHER			
5. GENERAL INSURANCE	701	177	177
6. MAINTENANCE & REPAIRS	214	65	65
7. MATERIALS & SUPPLIES	180	203	203
8. UNINSURED LOSSES	114	59	59
9. UTILITIES & TELEPHONE	332	187	187
10. MISCELLANEOUS UNALLOCATED EXP.		264	264
TOTAL OPERATING EXPENSE	$51,402	$52,174	$54,722
OPERATING INCOME (LOSS)	(8,500)	(12,810)	(17,056)
INCOME AS PERCENT OF REVENUE	-0-	-0-	-0-

NOTES:

This statement is on a cash basis and is unaudited

Plaintiffs' Exhibit No. 1 577a

LIBERTY PARKING

OPERATING STATEMENT FOR: Penn Avenue at Seventh St. Lot - 18 Spaces

	1968	1969	1970 PROJECTION
PARKING REVENUE	$30,300	$21,804	$20,925
OPERATING EXPENSE			
1. TAXES			
PARKING	1,030	3,146	4,101
REAL ESTATE			
PAYROLL	412	270	270
BUSINESS PRIVILEGE		105	112
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	18,000	18,000	18,000
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST	50	50	50
DEPRECIATION	397	414	414
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	7,360	5,142	5,553
MANAGEMENT FEE			
GROUP INSURANCE			
PENSION EXPENSE	800	499	499
UNIFORM EXPENSE	64	-	-
4. PROFESSIONAL SERVICE:			
AUDITING	100	125	125
LEGAL			
OTHER			
5. GENERAL INSURANCE	194	49	60
6. MAINTENANCE & REPAIRS	58	33	33
7. MATERIALS & SUPPLIES	100	100	100
8. UNINSURED LOSSES	11	16	16
9. UTILITIES & TELEPHONE	92	52	52
10. MISCELLANEOUS UNALLOCATED EXP.	-	150	150
TOTAL OPERATING EXPENSE	$30,689	$28,089	$29,535
OPERATING INCOME (LOSS)	(389)	(6,295)	(8,610)
INCOME AS PERCENT OF REVENUE	-0-	-0-	-0-

NOTES:

This statement is on a cash basis and is unaudited.

578a

Plaintiffs' Exhibit No. 1

LIBERTY PARKING

OPERATING STATEMENT FOR: Seventh St. Lot (Near Penn Ave.) 35 Spaces
(Lot acquired in January, 1968)

	1968	1969	1970 PROJECTION
PARKING REVENUE		$14,386	$13,681
OPERATING EXPENSE			
1. TAXES			
PARKING		2,084	2,086
REAL ESTATE			
PAYROLL		176	178
BUSINESS PRIVILEGE		69	71
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY		8,600	10,320
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST		50	50
DEPRECIATION			
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES		3,393	4,000
MANAGEMENT FEE			
GROUP INSURANCE			
PENSION EXPENSE		129	129
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING		125	125
LEGAL			
OTHER			
5. GENERAL INSURANCE		96	115
6. MAINTENANCE & REPAIRS		33	33
7. MATERIALS & SUPPLIES		100	100
8. UNINSURED LOSSES		32	32
9. UTILITIES & TELEPHONE		100	120
10. MISCELLANEOUS UNALLOCATED EXP		101	101
TOTAL OPERATING EXPENSE		$15,290	$18,072
OPERATING INCOME (LOSS)		(904)	(5,289)
INCOME AS PERCENT OF REVENUE		-0-	-+

NOTES:

This statement is on a cash basis and is unaudited.

LIBERTY PARKING, INC.

OPERATING STATEMENT FOR: LIBERTY AVENUE LOT 26 Spaces

	1968	1969	1970 PROJECTION
PARKING REVENUE	$14,461	$13,973	$17,632
OPERATING EXPENSE			
1.TAXES			
PARKING	1,446	2,833	3,456
REAL ESTATE			
PAYROLL	230	200	200
BUSINESS PRIVILEGE		67	84
OTHER			
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	8,400	8,400	9,000
RENT FOR OFFICE-ALLOCATED			
AMORTIZATION			
INTEREST	50	50	50
DEPRECIATION	663	19	19
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	4,100	3,826	4,132
MANAGEMENT FEE			
GROUP INSURANCE			
PENSION EXPENSE	445	371	371
UNIFORM EXPENSE	36		
4.PROFESSIONAL SERVICE:			
AUDITING	100	125	125
LEGAL			
OTHER			
5.GENERAL INSURANCE	280	71	86
6.MAINTENANCE & REPAIRS	86	33	33
7.MATERIALS & SUPPLIES	100	100	100
8.UNINSURED LOSSES	45	24	24
9.UTILITIES & TELEPHONE	133	75	75
10.MISCELLANEOUS UNALLOCATED EXP.		98	98
TOTAL OPERATING EXPENSE	$16,113	$15,492	$17,863
OPERATING INCOME (LOSS)	(1,652)	(1,519)	(231)
INCOME AS PERCENT OF REVENUE	-0-	-0-	-0-

NOTES:

This statement is on a cash basis.

Plaintiffs' Exhibit No. 1

LIBERTY PARKING — 40 Spaces

OPERATING STATEMENT FOR: Boulevard of Allies Lot

	1968	1969	1970 PROJECTION
PARKING REVENUE	$11,885	$12,773	$13,53
OPERATING EXPENSE			
1. TAXES			
PARKING	1,190	1,865	2,05
REAL ESTATE			
PAYROLL	287	361	36
BUSINESS PRIVILEGE		61	5
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	9,600	9,600	9,60
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST	50	50	5
DEPRECIATION	124	750	75
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	5,122	6,901	7,45
MANAGEMENT FEE			
GROUP INSURANCE			
PENSION EXPENSE	556	669	66
UNIFORM EXPENSE	45		
4. PROFESSIONAL SERVICE:			
AUDITING	100	125	12
LEGAL			
OTHER			
5. GENERAL INSURANCE	432	109	13
6. MAINTENANCE & REPAIRS	133	33	3
7. MATERIALS & SUPPLIES	100	100	10
8. UNINSURED LOSSES	69	36	3
9. UTILITIES & TELEPHONE	205	115	11
10. MISCELLANEOUS UNALLOCATED EXP.		90	9
TOTAL OPERATING EXPENSE	$18,012	$20,865	$21,63
OPERATING INCOME (LOSS)	(6,127)	(8,092)	(11,10
INCOME AS PERCENT OF REVENUE	-0-	-0-	-0-

NOTES:

This statement is on a cash basis and is unaudited.

LIBERTY PARKING

OPERATING STATEMENT FOR: Lot at Broad & Ansley Sts. P. Liberty-100 Spaces

	1968	1969	1970 PROJECTION
PARKING REVENUE	$20,444	$19,888	$17,275
OPERATING EXPENSE			
1.TAXES			
PARKING	2,045	2,906	3,386
REAL ESTATE			
PAYROLL	391	250	250
BUSINESS PRIVILEGE		96	83
OTHER			
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	1,868	1,600	1,200
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST	50	50	50
DEPRECIATION	171	209	309
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	7,000	4,690	5,065
MANAGEMENT FEE			
GROUP INSURANCE			
PENSION EXPENSE	760	455	455
UNIFORM EXPENSE	61	-	-
4.PROFESSIONAL SERVICE:			
AUDITING	100	125	125
LEGAL			
OTHER			
5.GENERAL INSURANCE	1,079	273	330
6.MAINTENANCE & REPAIRS	329	33	33
7.MATERIALS & SUPPLIES	100	100	100
8.UNINSURED LOSSES	175	91	91
9.UTILITIES & TELEPHONE	512	287	287
10.MISCELLANEOUS UNALLOCATED EXP.	-	138	138
TOTAL OPERATING EXPENSE	$14,641	$11,302	$11,811
OPERATING INCOME (LOSS)	5,803	8,586	5,464
INCOME AS PERCENT OF REVENUE	28.4%	43.2%	31.6%

NOTES:

Lot is owned by Urban Redevelopment Authority. Number of parking spaces varies as construction work affects available parking area. Rent is adjusted accordingly. This statement is on a cash basis and is unaudited.

582a Plaintiffs' Exhibit No. 1

LIBERTY PARKING 264 Spaces

OPERATING STATEMENT FOR: Lot at N. Highland at Penn Circle, Liberty

	1968	1969	1970 PROJECTED
PARKING REVENUE		$23,062	$28,701
OPERATING EXPENSE			
1. TAXES			
PARKING		3,459	5,877
REAL ESTATE			
PAYROLL		931	931
BUSINESS PRIVILEGE		111	184
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY			
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION		50	50
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES		17,790	23,101
MANAGEMENT FEE			
GROUP INSURANCE			
PENSION EXPENSE		1,726	1,726
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING		143	150
LEGAL			
OTHER			
5. GENERAL INSURANCE		721	872
6. MAINTENANCE & REPAIRS		33	33
7. MATERIALS & SUPPLIES		100	100
8. UNINSURED LOSSES		239	239
9. UTILITIES & TELEPHONE		758	758
10. MISCELLANEOUS UNALLOCATED EXP		161	87
TOTAL OPERATING EXPENSE		$25,222	$33,841
OPERATING INCOME (LOSS)		(2,160)	($5,140)
INCOME AS PERCENT OF REVENUE		-0-	n/a

NOTES: Lot opened in March 1970. It is owned by Pittsburgh Parking Authority. Note no rent is charged. Operator pays Authority 50% of any operating income in lieu of rent.

This statement is on a cash basis.

[redacted]

[redacted]

[redacted]

[redacted]		[redacted]	
[redacted]	$ .75	After 6:00 P.M. Flat Rate All Evening	$ .75
[redacted]	$ .50		
[redacted]	$ .30		
[redacted]	$ 2.25		

LOT AT 137 SEVENTH STREET
(Near Penn Avenue)

DAY RATE		NIGHT RATE	
1/2 Hour or Less	$ .60	After 6:00 P.M. Flat Rate All Evening	$ .75
1 Hour or Less	$ .75		
Each Additional Hour	$ .30		
Maximum	$ 2.25		

LOT AT FIFTH AVENUE & SEVENTH STREET

DAY RATE		NIGHT RATE	
1/2 Hour or Less	$ .75	After 6:00 P.M. Flat Rate All Evening	$ 1.50
1 Hour or Less	$ .90		
Each Additional Hour	$ .60		
Maximum	$ 3.25		

LOT AT 304 BOULEVARD OF ALLIES

DAY RATE		NIGHT RATE	
1 Hour or Less	$ .75	After 6:00 P.M. Flat Rate All Evening	$ 1.00
Each Additional Hour	$ .50		
Maximum	$ 2.25		

Plaintiffs' Exhibit No. 1

Liberty Parking - Contd.

PARKING RATES FORMERLY IN EFFECT
RATES EFFECTIVE FEBRUARY 1970

LOT ON LIBERTY AVENUE AT NIXON THEATRE

DAY RATE		NIGHT RATE
1/2 Hour or Less	$ .75	
1 Hour or Less	$ 1.00	
Each Additional Hour	$ .25	
Maximum	$ 2.25	

LOT AT BROAD & ASHLEY STREETS, EAST LIBERTY

DAY RATE		NIGHT RATE
All Day, Weekdays & Saturdays, Flat Rate	$ .75	

LOT AT HIGHLAND AVENUE & PENN CIRCLE, EAST LIBERTY *

DAY RATE		NIGHT RATE
2 Hours or Less	$ .25	
All Day	$ .50	

* This is a Pittsburgh Parking Authority lot and rates are fixed by the Authority.

METERS PARKING SYSTEM

Plaintiffs' Exhibit No. 1

MEYERS PARKING SYSTEM

1968, 1969 AND PROJECTED 1970 INCOME AND OPERATING COSTS BY INDIVIDUAL FACILITIES

1968	CHATHAM CENTER GARAGE
PARKING REVENUE	$ 917,673
OPERATING EXPENSE	858,948
OPERATING INCOME (LOSS)	58,725
INCOME AS PERCENT OF REVENUE	6.4 %
1969	
PARKING REVENUE	967,325
OPERATING EXPENSE	937,910
OPERATING INCOME (LOSS)	29,415
INCOME AS PERCENT OF REVENUE	3.0%
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 10%	59,320
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	6.1%
1970 PROJECTION	
PARKING REVENUE	1,015,188
OPERATING EXPENSE WITH PARKING TAX AT 20% EFF. 2-1-70	997,811
OPERATING INCOME (LOSS)	17,377
INCOME AS PERCENT OF REVENUE	1.7%
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 15%	64,076
INCOME WITH PARKING TAX OF 15% AS PERCENT OF REVENUE	6.3%
OPERATING INCOME (LOSS) IF PARKING WERE 10%	114,835
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	11.3%

[redacted]

OPERATING STATEMENT

FOR

[redacted]

([redacted] Parking Spaces)

	1968	1969	1970 Projection
Revenue	$917,673	$967,385	$1,013,188
Operating Expenses			
Parking Taxes	$ 82,034	$126,638	$ 198,977
Real Estate Taxes	-	48,472	48,472
Payroll Taxes & Union Costs	12,970	13,190	13,190
Rent	522,013	561,270	537,196
Payroll	77,844	86,079	91,641
Office Salaries & Expenses	23,372	13,510	19,584
Utilities	23,736	28,686	28,686
Insurance	6,858	4,200	4,200
Material & Supplies	3,053	2,914	2,914
Repairs & Maintenance	19,887	20,790	20,790
Other	27,253	32,161	32,161
Total Expenses	$858,948	$937,910	$ 997,011
Operating Income (Loss)	$ 58,725	$ 29,415	$ 17,377
Operating Income As Percent Of Revenue	6.4%	3.0%	1.7%

Rent Projection: Twice first six months actual.

Payroll Projection: $44,922 + 104% of 44,922 = $91,641.

Revenue Projection: First six months actual ÷ 49.4 x 100.

Parking Tax Projection: Revenue x .196

Office Salaries & Expenses: Twice first six months actual.

All other items are Projected to be the same as 1969.

Plaintiffs' Exhibit No. 1

MEYERS PARKING SYSTEM

PARKING RATES PRESENTLY IN EFFECT

CHATHAM CENTER GARAGE 5th Avenue at Washington Place

1/2 Hour or Less	$ .25
1/2 Hour to 1 Hour	.50
1 Hour to 2 Hours	.75
2 Hours to 4 Hours	$ 1.00
4 Hours to 6 Hours	$ 1.25
6 Hours to 8 Hours	$ 1.50
8 Hours to 12 Hours	$ 1.75
12 Hours to 18 Hours	$ 2.00
18 Hours to 24 Hours	$ 2.25

Night Rate 5:00 P.M. to 2:00 A.M. $1.00 Flat Rate

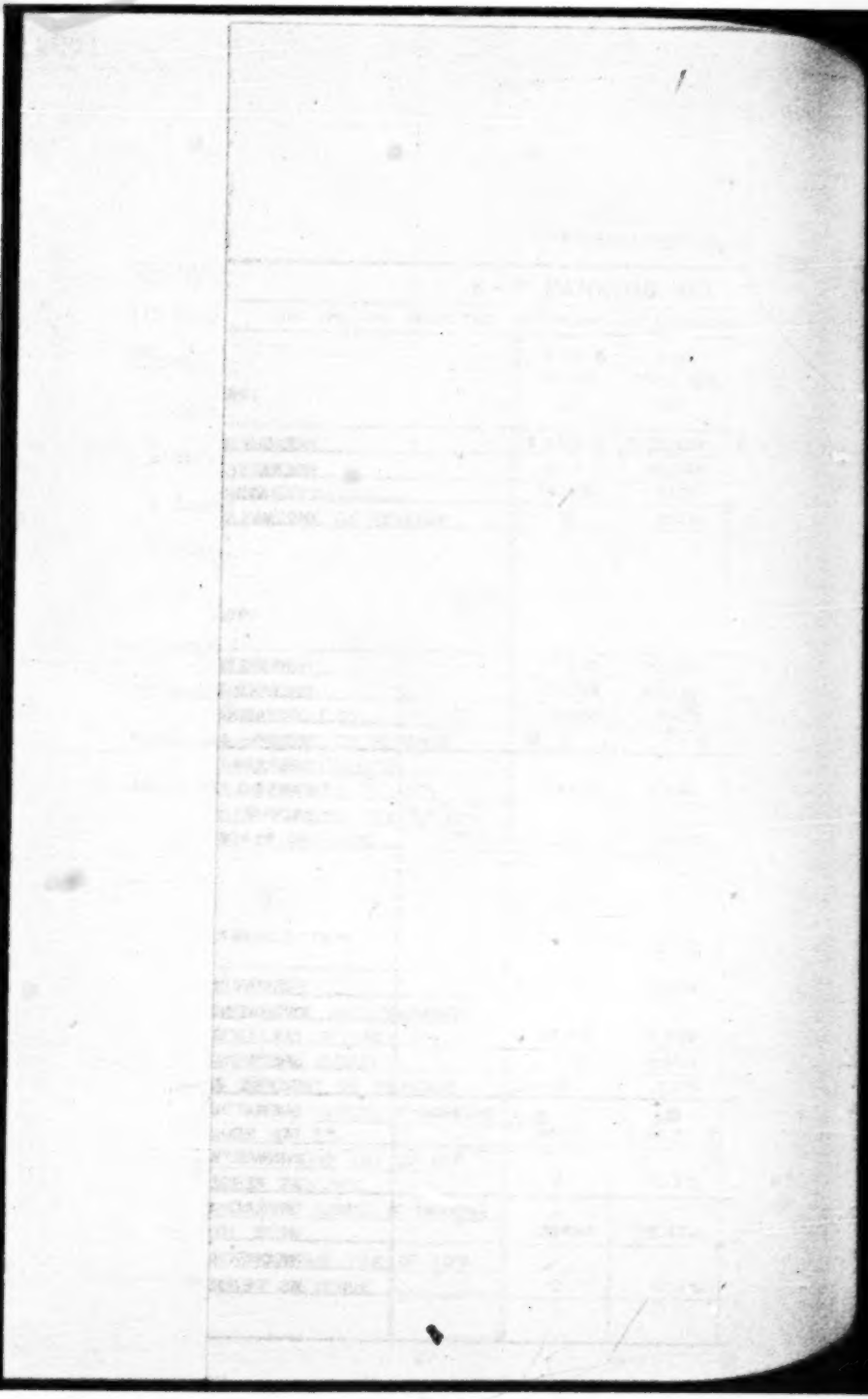
Above rates effective October 1, 1969

E-7 PARKING

K-7 PARKING CO.

1968, 1969 AND PROJECTED 1970 INCOME AND OPERATING COSTS BY INDIVIDUAL FACILITIES

1968	9 TH. & PENN LOT	824 PENN AVE. LOT	B & O STATION LOT	TOTAL DOWNTOWN LOTS		ST. FRANCIS HOSPITAL LOT
PARKING REVENUE	$ 43,548	$ 65,889	$ 92,265	$201,702		$ 36,725
OPERATING EXPENSE	52,613	60,064	85,505	198,182		73,017
OPERATING INCOME (LOSS)	(9065)	5825	6760	3520		(36,292)
INCOME AS PERCENT OF REVENUE	0	8.8%	7.3%	1.7%		0
1969						
PARKING REVENUE	47,645	71,433	102,144	221,222		39,789
OPERATING EXPENSE	55,734	66,130	95,919	217,783		82,666
OPERATING INCOME (LOSS)	(8089)	5303	6225	3439		(42,877)
INCOME AS PERCENT OF REVENUE	0	7.4%	6.1%	1.6%		0
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 10%	(5889)	8598	10,907	13,616		(41,039)
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	0	12.0%	10.7%	6.2%		0
1970 PROJECTION						
PARKING REVENUE	51,411	77,974	111,939	241,324		44,225
OPERATING EXPENSE WITH PARKING TAX AT 20% EFF. 2-1-70	59,313	71,990	102,741	234,044		85,670
OPERATING INCOME (LOSS)	(7902)	5984	9198	7280		(41,455)
INCOME AS PERCENT OF REVENUE	0	7.7%	8.2%	3.0%		0
OPERATING INCOME (LOSS) IF PARKING TAX REMAINED AT 15%	(5537)	9571	14,347	18,381		(39,422)
INCOME WITH PARKING TAX OF 15% AS PERCENT OF REVENUE	0	12.3%	12.8%	7.6%		0
OPERATING INCOME (LOSS) IF PARKING WERE 10%	(2966)	13,470	19,944	30448		(37,210)
INCOME WITH PARKING TAX OF 10% AS PERCENT OF REVENUE	0	17.3%	17.8%	12.6%		0



A-7 PARKING CO.

OPERATING STATEMENT FOR: 9th St. at Penn Lot 54 Spaces

	1968	1969	1970 PROJECTION
PARKING REVENUE	$43,548	$47,645	$50,411
OPERATING EXPENSE			
1. TAXES	436	485	38
PARKING	4,335	5,864	10,877
REAL ESTATE			
PAYROLL	963	621	621
BUSINESS PRIVILEGE		237	286
OTHER	14	221	357
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	20,000	21,526	21,526
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION & Depreciation	1,903	2,297	2,297
INTEREST			
DEPRECIATION			
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	17,674	17,102	17,752
MANAGEMENT FEE			
GROUP INSURANCE			
PENSION EXPENSE			
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING			
LEGAL	240	240	245
OTHER			
5. GENERAL INSURANCE	2,260	2,120	2,120
6. MAINTENANCE & REPAIRS	629	187	187
7. MATERIALS & SUPPLIES	110 71	78	100
8. UNINSURED LOSSES	199	207	207
9. UTILITIES & TELEPHONE	432	589	589
10. MISCELLANEOUS UNALLOCATED EXP.	100 3,219	55 2,875	55 2,876
TOTAL OPERATING EXPENSE	$52,613	$55,734	$59,313
OPERATING INCOME (LOSS)	(9,065)	(8,089)	(7,902)
INCOME AS PERCENT OF REVENUE	-0-	-0-	-0-

NOTES:

Plaintiffs' Exhibit No. 1

K-7 PARKING CO.

OPERATING STATEMENT FOR: 824 Penn Avenue Lot 130 Spaces

	1968	1969	1970 PROJECTION
PARKING REVENUE	$65,289	$71,433	$77,[illegible]
OPERATING EXPENSE			
1. TAXES			
PARKING	6,589	10,438	15,[illegible]
REAL ESTATE			
PAYROLL	566	867	[illegible]
BUSINESS PRIVILEGE		360	[illegible]
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	31,580	31,970	31,[illegible]
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION	60	80	[illegible]
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	17,035	18,056	19,[illegible]
MANAGEMENT FEE			
GROUP INSURANCE			
PENSION EXPENSE			
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING			
LEGAL	1,440	1,040	1,[illegible]
OTHER			
5. GENERAL INSURANCE	2,199	2,075	2,[illegible]
6. MAINTENANCE & REPAIRS	66	11	11
7. MATERIALS & SUPPLIES	124	[illegible]	[illegible]
8. UNINSURED LOSSES	122	952	952
9. UTILITIES & TELEPHONE		-	18
10. MISCELLANEOUS UNALLOCATED EXP.	204	155	155
TOTAL OPERATING EXPENSE	$60,065	$66,130	$71,[illegible]
OPERATING INCOME (LOSS)	5,224	5,303	5,[illegible]
INCOME AS PERCENT OF REVENUE	8.0%	7.4%	7.[illegible]%
NOTES:			

Plaintiffs' Exhibit No. 1 593a

K-7 PARKING CO.

OPERATING STATEMENT FOR: B & O Station lot 190 Spaces

	1968	1969	1970 PROJECTION
PARKING REVENUE	$92,265	$102,145	$111,938
OPERATING EXPENSE			
1.TAXES	385		
PARKING	9,227	14,896	21,948
REAL ESTATE			
PAYROLL	629	638	638
BUSINESS PRIVILEGE		505	613
OTHER			
2.EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	57,765	61,115	61,115
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION	94	94	94
3.MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	14,665	14,582	14,247
MANAGEMENT FEE			
GROUP INSURANCE			
PENSION EXPENSE			
UNIFORM EXPENSE			
4.PROFESSIONAL SERVICE:			
AUDITING			
LEGAL	240	240	243
OTHER			
5.GENERAL INSURANCE	2,287	2,057	2,057
6.MAINTENANCE & REPAIRS			
7.MATERIALS & SUPPLIES	118	78	78
8.UNINSURED LOSSES			
9.UTILITIES & TELEPHONE		1,055	1,055
10.MISCELLANEOUS UNALLOCATED EXP.	480	599	598
TOTAL OPERATING EXPENSE	$85,505	$95,970	$102,741
OPERATING INCOME (LOSS)	6,760	6,225	9,198
INCOME AS PERCENT OF REVENUE	7.3%	6.1%	8.2%
NOTES:			

Plaintiffs' Exhibit No. 1

K-7 PARKING CO.

OPERATING STATEMENT FOR: St. Francis Hospital Lot

	1968	1969	1970 PROJECTION
PARKING REVENUE	$36,725	$39,789	$44,225
OPERATING EXPENSE			
1. TAXES			
PARKING	3,673	5,817	8,668
REAL ESTATE			
PAYROLL	2,982	3,456	3,456
BUSINESS PRIVILEGE		199	239
OTHER			
2. EXPENSE RELATED TO USE OF PROPERTY			
RENT OF PROPERTY	3,650	4,418	4,418
RENT FOR OFFICE - ALLOCATED			
AMORTIZATION			
INTEREST			
DEPRECIATION	854	976	674
3. MANAGEMENT & LABOR COSTS:			
WAGES & SALARIES	57,133	63,021	63,556
MANAGEMENT FEE			
GROUP INSURANCE			
PENSION EXPENSE			
UNIFORM EXPENSE			
4. PROFESSIONAL SERVICE:			
AUDITING			
LEGAL	240	240	265
OTHER			
5. GENERAL INSURANCE	2,083	2,018	2,018
6. MAINTENANCE & REPAIRS			
7. MATERIALS & SUPPLIES	118	234	262
8. UNINSURED LOSSES	2,079	1,970	1,970
9. UTILITIES & TELEPHONE			
10. MISCELLANEOUS UNALLOCATED EXP.	305	317	364
TOTAL OPERATING EXPENSE	$73,017	$82,666	$85,670
OPERATING INCOME (LOSS)	*(36,292)	*(42,877)	*(41,445)
INCOME AS PERCENT OF REVENUE	-0-	-0-	-0-

NOTES: *Loss from parking operations. In addition to the Parking Revenue K-7 Parking received a management fee from hospital as follows: $35,580 in 1967, reducing loss to K-7 to $792 + $42,000 in 1969 reducing loss to $877. The projected fee for 1970 is $42,000 which would result in a profit to K-7 of $555 or 6.3% of Parking Revenue.

K-7 PARKING CO.

PARKING RATES PRESENTLY IN EFFECT
RATES EFFECTIVE FEBRUARY 1, 1970

9TH & PENN LOT
9th St. at Penn Ave.

DAY RATE		NIGHT RATE	
½ Hour or Less	$ .70	After 6:00 P.M.	$ .85
½ Hour To 1 Hour	$ .80	Sunday All Day	.85
1 Hour to 2 Hours	$ 1.15	Holidays - All Day	.85
Each additional hour	$ .35		

824 PENN AVE. LOT

DAY RATE		EVENING & NIGHT RATE	
A.M. to 6:00 P.M.		6:00 P.M. to 7:00 A.M.	$ .65
½ Hour or Less	$ .65		
½ Hour to 1 Hour	.75		
1 Hour to 2 Hours	$ 1.00		
2 Hours to 3 Hours	$ 1.30		
3 Hours to 4 Hours	$ 1.55		
4 Hours to 9 Hours	$ 1.95		
Each Additional Hour	$ .20		
4 Hours Maximum	$ 2.25		

Plaintiffs' Exhibit No. 1

K-7 PARKING CO. (Contd.)

PARKING RATES PRESENTLY IN EFFECT
RATES EFFECTIVE FEBRUARY 1, 1970

B & O STATION LOT
18t. Ave. & Grant St.

DAY RATE

2 Hours or Less	$ .95	Saturday - All Day	$ .95
All Day	$ 1.85		
3 P.M. to 7:00 A.M.	.95		

ST. FRANCIS HOSPITAL LOT
45th St. Near Penn Ave.

DAY RATE

12 Midnight to 1:00 P.M.		Evening Rates Starting at 3 P.M.	$ .75
1 Hour or Less	$ .50	Sundays & Holidays - All day	$ .75
2 Hour to 2 Hours	.60		
2 Hours to 3 Hours	.75		
All Day	.85		

Plaintiffs' Exhibit No. 3

COMPARISON OF 1969 RECEIPTS FROM THE BUSINESS PRIVILEGE, MERCANTILE, AND PARKING TAXES, AND THE NUMBER OF TAXPAYERS OR BUSINESS FACILITIES PAYING EACH TAX

	Total 1969 Receipts	No. Of Taxpayers
siness Privilege Tax	$4,501,221.87	13,974
rcantile Tax	$2,021,826.85	7,250

	Total 1969 Receipts	No. Of Parking Facilities Paying Tax
rking Tax	$2,121,442	299
rking Tax Paid Plaintiffs	$1,304,004	Involving 59 Facilities

e above data as to the amount of Business Privilege Tax and Mercantile x receipts were taken from the Annual Report of the City Controller r the fiscal year ending Dec. 31, 1969. The number of taxpayers of se taxes was obtained from the Data Processing Division of the City easurer's Office.

e data relative to the Parking Tax was obtained from the City Treasurer's fice, Division of Parking Tax.

Plaintiffs' Exhibit No. 6

PARKING RATES IN EFFECT

	1969			1970		
	Stanwix Garage Effective Jan. 1969	Gateway Center Garage Effective Feb. 1, 1969	Ft. Duquesne-6th Street Garage Effective Jan. 21, '69	Stanwix Garage	Gateway Center Garage	Ft. Duquesne-6th Street Garage Effective Feb. 1, 1
1 Hour	$ .75	$ .75	$ .30	$ .75	$ .75	$ .30
2 Hours	1.00	1.00	.45	1.00	1.00	.30
3 Hours	1.25	1.25	.65	1.25	1.25	.30
4 Hours	1.50	1.50	.90	1.50	1.50	.45
5 Hours	1.75	1.75	1.25	1.75	1.75	1.30
6 Hours	2.00	2.00	1.55	2.00	2.00	1.45
7 Hours	2.25	2.25	1.65	2.25	2.25	1.75
8 Hours	2.50	2.50	1.85	2.50	2.50	1.95
9 Hours	2.75	2.50	1.95	2.75	2.50	1.95
10 Hours	3.00	2.50	2.15	3.00	2.50	2.15
10 To 24 Hours	3.00			3.00		2.30
11 Hours		2.50	2.20		2.50	2.35
12 Hours		2.50	2.30		2.50	2.45
12 To 16 Hours		2.75			2.75	
13 To 24 Hours			2.30			2.45
16 To 24 Hours		3.00			3.00	

Comments Re 1969 and 1970 Rates:

Up to 3 hours of parking time rates in privately owned garages were approximately twice those in the publicly owned garage. In 1969 the rates for between 5 and 9 hours of parking time were approximately 30 to 40% higher in the privately owned garages, but due to the raise in rates at the publicly owned garages, effective Feb. 1, 1970, this difference had dropped to where the private rates were only about 20 to 30% higher for from 5 to 9 hours of parking time.

PARKING RATES IN EFFECT

	1967			1968		
	Stanwix Garage Effective June 1967	Gateway Center Garage	Ft. Duquesne 6th Street Garage	Stanwix Garage Effective Oct. 1968	Gateway Center Garage Effective 6-15-64	Ft. Duquesne - 6th Street Garage
	$ .50	$ .50	$ .50	$ .50	$ .50	$ .50
	.75	.75	.65	.75	.75	.65
	1.00	.95	.65	1.00	1.00	.65
	1.25	1.20	.90	1.25	1.20	.90
	1.50	1.40	1.20	1.50	1.40	1.20
	1.75	1.60	1.35	1.75	1.60	1.35
	2.00	1.60	1.50	2.00	1.60	1.50
	& Over 2.25	1.80	1.65	2.25	2.00	1.65
		2.00	1.75		2.25	1.75
		2.00	1.95		2.25	1.95
		2.00	2.10		2.25	2.10
		2.00			2.25	
			2.25			2.25
					2.50	
		2.25				
		2.50				
					2.00	
		2.80				

Plaintiffs' Exhibit No. 7

PLAINTIFF'S EXHIBIT 7
DATE
THOMAS A. MUSTACHIO
OFFICIAL REPORTER

AVERAGE PARKING RATES*

INTERVAL	PUBLIC LOTS (1)	PUBLIC GARAGES	PARKING AUTHORITY GARAGES (3)
1 Hour	$ 0.63	$ 0.70	$ 0.35
2 Hours	0.97	0.92	0.51
3 Hours	1.25	1.15	0.83
All Day	1.97	2.11	1.73

(1) 20 Public Lots
(2) 8 Public Garages
(3) 8 Parking Authority Garages

SOURCE: 1969 Parking Study, Pittsburgh, Pennsylvania, Central Business District By Wilbur Smith & Associates, Dated June, 1970.

Plaintiffs' Exhibit No. 9

NO. 675

PLAINTIFF'S EXHIBIT 9

DATE

THOMAS A. FUSTO, CHIEF
OFFICIAL REPORTER

AN ORDINANCE

To provide for the general revenue by imposing a tax at the rate of 6 mills upon the privilege of operating or conducting business in the City of Pittsburgh as measured by the gross receipts therefrom; requiring registration and payment of the tax as a condition to the conducting of such business; providing for the levy and collection of such tax; prescribing requirements for returns and records; conferring powers and duties upon the Treasurer; and imposing penalties.

THE COUNCIL OF THE CITY OF PITTSBURGH, UNDER THE AUTHORITY OF ACT NO. 511 of 1965 and ITS AMENDMENTS, HEREBY ENACTS AS FOLLOWS:

SECTION 1. Title: This ordinance shall be known and may be cited as the "Business Privilege Tax Ordinance."

SECTION 2. Definitions: As used in this ordinance, unless the context indicates clearly a different meaning, the following words and phrases shall have the meanings set forth below:

(a) "City" - the City of Pittsburgh.

(b) "Person" - any natural person, partnership, unincorporated association or corporation, non-profit or otherwise. Whenever used in any provision prescribing a fine or a penalty, the word "person," as applied to partnerships, shall mean the partners thereof, and as applied to corporations and unincorporated associations, shall mean the officers thereof.

(c) (1) "Business" - carrying on or exercising whether for gain or profit or otherwise within the City of Pittsburgh any trade, business, including but not limited to financial business as hereinafter defined, profession, vocation, service, construction, communication or commercial activity, or making sales to persons or rendering services from or attributable to a Pittsburgh office or place of business.

(2) "Business" - shall not include the following: any business which is subject to the City of Pittsburgh mercantile tax; the business of any political subdivision, any employment for a wage or salary, any business upon which the power to levy a tax is withheld by law.

(d) "Financial Business" - The services and transactions of banks and bankers, trust credit and investment companies, where not prohibited by law, holding companies, dealers and brokers in money, credits, commercial paper, bonds, notes, securities and stocks, monetary metals, factors and commission merchants.

(e) "Tax Year" - the Twelve month period from January 1 to December 31.

(f) "Gross Receipts" - Cash, credits, property of any kind or nature, rec in or allocable or attributable to the City of Pittsburgh from any bus or by reason of any sale made, including resales of goods, wares or merchandise taken by a dealer as a trade-in or as part payment for oth goods, wares or merchandise, or services rendered, or commercial or business transaction had within the City of Pittsburgh, without deductio therefrom on account of the cost of property sold, materials used, labo service, or other cost, interest, or discount paid, or any other expens

"Gross Receipts" shall exclude:

(1) The amount of any allowance made for goods, wares or merchandi taken by a dealer as a trade-in or as part payment for other goods, wa and merchandise in the usual and ordinary course of his business.

(2) In the case of a financial business, the cost of securities and other property sold, exchanged, paid at maturity, or redeemed, and moneys or credits received in repayment of advances, credits and loans, but no to exceed the principal amount of such advances, credits and loans, and shall also exclude deposits.

(3) In the case of a broker, or commissions paid by him to another bro on account of a purchase or sales contract initiated, executed or cleare conjunction with such other broker.

(4) Receipts by dealers from sales to other dealers in the same line w the dealer transfers title or possession at the same price for which he acquired the goods, wares or merchandise.

(5) Receipts or that portion thereof attributable to interstate or foreign commerce or to an office or place of business regularly maintained by the taxpayer, outside the limits of the City of Pittsburgh, and not for the purpose of evading payment of this tax and those receipts which the City is prohibited from taxing by law. Such receipts shall be segregated as s forth in Section 4(c) of this Ordinance.

(g) "Treasurer" - The Treasurer of the City of Pittsburgh.

(h) "Temporary seasonal or itinerant business" - shall mean any business is conducted at one location for less than sixty (60) consecutive calend

(i) "Gross Receipts" - shall include both cash and credit transactions.

(j) "Wholesale Dealer or Wholesale Vendor" - Any person who sells to dea in or vendors of goods, wares, and merchandise.

Section 3. Imposition and Rate of Tax: Every person engaging in any business in the City of Pittsburgh beginning with the tax year 1969 and [illegible] thereafter, shall pay an annual tax at the rate of six (6) mills on each dollar of volume [illegible] gross annual receipts thereof, except that the gross volume of wholesale business transacted by wholesale dealers in goods, wares and merchandise is taxable at the rate of one (1) [illegible] as set forth in Section 8 of Act 511 of 1965.

Section 4. Computation of Gross Annual Receipts:

(a) Every person, subject to the payment of the tax hereby imposed who has commenced his business at least one (1) full year prior to the beginning of any tax year shall compute his annual gross receipts upon the actual receipts received by him during the preceding calendar year.

(b) Every person, subject to the payment of the tax hereby imposed who has commenced his business less than one (1) full year prior to the tax year 1969, or who has commenced his business subsequent to the beginning of any tax year, for such tax year, shall compute his annual gross receipts upon the actual gross receipts received by him during the part of such tax year remaining and on the actual gross receipts of his first full year for the second full tax year he engages in business, as the case may be. In the case of a business commencing less than one (1) full year prior to any tax year, the average monthly volume of business multiplied by twelve (12) shall be the basis for computing the gross volume of business for the first full tax year.

(c) Where a receipt in its entirety cannot be subjected to the tax imposed by this ordinance by reason of the provisions of the Constitution of the United States, or any other provision of law, including the exemptions within this ordinance, the Treasurer shall establish rules and regulations and methods of allocation and evaluation so that only that part of such receipt which is properly attributable and allocable to the doing of business in the City of Pittsburgh shall be taxed hereunder. The Treasurer may make such allocation with due regard to the nature of the business concerned on the basis of mileage division of the receipt according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the City of Pittsburgh to the total property or assets of the taxpayer wherever owned and situated, or any other method or methods of calculation other than the foregoing, calculated to effect a fair and proper allocation. Every person who ceases to carry on a business during any tax year shall be permitted to apportion his tax for such tax year and shall pay for such tax year an amount to be computed by multiplying his gross receipts for the preceding full calendar year by a fraction whose numerator shall be the number of months such person was in business during the tax year and whose denominator shall be twelve.

Plaintiffs' Exhibit No. 9

(d) Every person subject to the payment of the tax hereby imposed who engages in a business, temporary, seasonal or itinerant by its nature, shall compute his annual gross receipts upon the actual gross receipts received by him during such tax year.

(e) Every person subject to the payment of the tax hereby imposed and who is also subject to the Occupational Privilege Tax levied by Ordinance No. 597 approved December 28, 1967 may deduct said Occupational Privilege Tax from the amount of tax due and owing under the provisions of this Ordinance.

SECTION 5. Returns and Registration

(a) Every person subject to the tax imposed by this ordinance shall forthwith register with the Treasurer and set forth his name, address, business address and the nature of the business activity in which he is engaged.

(b) Every return shall be made upon a form furnished the Treasurer. Every person making a return shall certify the correctness thereof.

(c) Every person subject to the tax imposed by this ordinance who has commenced his business at least one (1) full year prior to the beginning of any tax year shall, on or before May 15, 1969, and annually thereafter, file with the Treasurer a return setting forth his name, his business and business address, and such other information as may be necessary in arriving at the annual gross volume of business transacted by him during the preceding year and the amount of the tax due.

(d) Every person subject to the tax imposed by this ordinance who has commenced his business less than one (1) full year prior to the beginning of the tax year 1969, shall, on or before May 15, 1969, file with the Treasurer a return setting forth his name, his business, business address and such other information as may be necessary in arriving at the actual volume of business transacted by him during the period of operation prior to January 1, 1969, and the amount of the tax due.

(e) Every person subject to the tax imposed by this ordinance who commences business subsequent to the beginning of any tax year for such tax year shall on or before January 31 of the succeeding tax year file a return with the Treasurer setting forth his name, his business, his business address, and such other information as may be necessary in arriving at the actual gross volume of business transacted by him during such tax period and the amount of the tax due.

(f) Every person subject to the tax imposed by this ordinance who commences business subsequent to the beginning of any tax year shall on or before

May 15 of the succeeding tax year file a return with the Treasurer setting forth his name, his business, his business address, and such other information as may be necessary in arriving at the gross volume of business for the first full tax year and the amount of tax due. The average monthly volume of business transacted in the preceding year multiplied by twelve shall be the basis for computing the gross volume of business for the first full tax year.

(g) Every person subject to the payment of the tax imposed by this ordinance who engages in a business temporary, seasonal or itinerant by its nature, shall within seven (7) days from the day he completes such business, file a return with the Treasurer setting forth his name, his business, his business address, and such other information as may be necessary in arriving at the actual gross volume of business during the tax period and the amount of the tax due.

TION 6. Payment at Time of Filing Return:

The person making the return shall at the time of filing the return pay the nt of tax shown as due thereon to the Treasurer.

TION 7. Powers and Duties of Treasurer:

(a) It shall be the duty of the Treasurer to collect and receive the taxes, fines and penalties imposed by this ordinance. It shall also be his duty to keep a record showing the amount received by him from each person paying the tax and the date of such receipts.

(b) The Treasurer is hereby charged with the administration and enforcement of the provisions of this ordinance, and is hereby empowered to prescribe, adopt, promulgate and enforce rules and regulations relating to any matter pertaining to the administration and enforcement of this ordinance, including provision for the reexamination and correction of returns, and payments alleged or found to be incorrect, or as to which an overpayment is claimed or found to have occurred, and to make refunds where necessary. Any person aggrieved by any decision of the Treasurer shall have the right to appeal to court as in other cases provided.

(c) The Treasurer is hereby authorized to compel the production of books, papers and records, and the attendance of all persons before him whether as parties or witnesses whom he believes to have knowledge of such receipts.

(d) The Treasurer is hereby authorized to examine the books, papers and records of any taxpayer or supposed taxpayer, in order to verify the accuracy of any return made, or, if no return was made, to ascertain the tax due. Every such taxpayer or supposed taxpayer is hereby directed and required to give to the Treasurer the means, facilities and opportunity for such examinations and investigations as are hereby authorized.

Plaintiffs' Exhibit No. 9

SECTION 8. Suit on Collection: Penalty:

(a) The Treasurer may sue for the recovery of taxes due and unpaid under this ordinance.

(b) If for any reason the tax is not paid when due in each year, interest at the rate of six percent per annum, and an additional penalty of one-half of one percent of the amount of the unpaid tax for each month or fraction thereof during which the tax remains unpaid, shall be added and collected. Where suit is brought for the recovery of any such tax, the person liable therefor shall, in addition, be liable for the costs of collection and the interest and penalties herein imposed.

SECTION 9. Fine and Penalties:

Whoever makes any false or untrue statement on his return, or who refuses to permit inspection of the books, records or accounts of any business in his custody or control when the right to make such inspection by the Treasurer is requested, and whoever fails or refuses to file a return required by this ordinance, shall, upon conviction before any alderman or magistrate, be sentenced to pay a fine of not more than three hundred dollars ($300.00) for each offense, and in default of payment of said fine, be imprisoned in Allegheny County Jail or Allegheny County Workhouse for a period not exceeding thirty (30) days for each offense.

SECTION 10. Saving Clause:

(a) Nothing contained in this ordinance shall be construed to empower the City of Pittsburgh to levy and collect the taxes hereby imposed on any person or any business or any portion of any business not within the taxing power of the City of Pittsburgh under the Constitution of the United States and the laws and Constitution of the Commonwealth of Pennsylvania.

(b) If the tax, or any portion thereof, imposed upon any person under the provisions of this ordinance shall be held by any court of competent jurisdiction to be in violation of the Constitution of the United States or of the Commonwealth of Pennsylvania, the decision of the court shall not affect or impair the right to impose the taxes or the validity of the taxes so imposed upon other persons as herein provided.

(c) If a final decision of a court of competent jurisdiction holds any provision of this ordinance, or the application of any provision to any circumstance, to be illegal or unconstitutional, the other provisions of this ordinance, or the application of such provision to other circumstances, shall remain in full force and effect. The intention of Council is that the provisions of this ordinance shall be severable and that this ordinance would have been adopted if any such illegal or unconstitutional provisions had not been included.

CTION 11. Payment under Protest - Refunds:

The City Treasurer is hereby authorized to accept payment under protest of ...ment of business privilege tax claimed by the City in any case where the taxpayer disputes ...ility or amount of the City's claim for tax. If it is thereafter judicially determined by a ...t of competent jurisdiction that the City has been overpaid, the amount of the overpayment ...l be refunded to the taxpayer. All refunds shall be made in conformance with the procedure ...ribed in Ordinance No. 162, approved May 9, 1962.

CTION 12. Effective Date:

The provisions of this ordinance shall become effective February 1, 1969, and ...l remain in effect thereafter, from year to year, on a calendar year basis.

CTION 13. That any Ordinance or part of Ordinance, conflicting with the provisions of this Ordinance, be and the same is hereby repealed so far as the same affects this ...ance.

Ordained and enacted into a law in Council, this 27th day of December A.D. 19 68.

John F. Counahan
President of Council

...t: Louis C. DiNardo
Clerk of Council

Mayor's Office December 28, 19 68

Approved: Joseph M. Barr
Mayor

...t: Thomas A. Sorce
Mayor's Asst. Secretary.

...rded in Ordinance Book, Vol. 70 Page 258, 28th day of December 19 68.

Pittsburgh January 3, 1969

I do hereby certify that the foregoing is a true and correct copy of Ordinance ...675, Series 1968, as the same appears of record in the office of the City Clerk.

Louis C. DiNardo
City Clerk

608a

Plaintiffs' Exhibit No. 10

ALCO PARKING CORPORATION

ALLEGHENY CENTER GARAGE

NTIFF'S EXHIBIT 10

OMAS A. MUSTACHIO
OFFICIAL REPORTER

FINANCIAL STATEMENTS

DECEMBER 31, 1969

J. K. LASSER & COMPANY
INTERNATIONALLY
LASSER, HARMOOD BANNER & DUNWOODY

Plaintiffs' Exhibit No. 10

J. K. LASSER & COMPANY
INTERNATIONALLY
LASSER, HARMOOD BANNER & DUNWOODY
[illegible] Robert E. Lee Bldg., Pittsburgh, Pa. 15222 · 412-261-5113

OFFICES IN
PRINCIPAL CITIES
AROUND THE WORLD

CABLE ADDRESS
JKLASSER PITTSBURGH

TO THE BOARD OF DIRECTORS AND SHAREHOLDERS
ALCO PARKING CORPORATION

We have examined the statement of financial position of ALCO PARKING CORPORATION, ALLEGHENY CENTER GARAGE as of December 31, 1969 and the related statement of income and deficit for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accounting records are maintained in such a manner as to conform with the requirements of the lease agreement, dated January 14, 1965, together with agreement of amendment dated June 24, 1969, with the City of Pittsburgh, North Side Parking Corporation and the aforementioned financial statements present fairly the financial position of the ALLEGHENY CENTER GARAGE, as an operating unit of ALCO PARKING CORPORATION, as of December 31, 1969, and the results of its operations for the year then ended in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

J. K. Lasser & Company

Pittsburgh, Pennsylvania
March 1, 1970

610a

Plaintiffs' Exhibit No. 10

J K LASSER & COMPANY

-2-

ALCO PARKING CORPORATION

ALLEGHENY CENTER GARAGE

STATEMENT OF FINANCIAL POSITION

DECEMBER 31, 1969 AND 1968

ASSETS

	1969	1968
CURRENT ASSETS		
Cash in banks and on hand	$ 40,797	$ 31,614
Accounts receivable	26,905	14
Prepaid insurance	4,665	153
	72,367	31,781
PROPERTY AND EQUIPMENT - AT COST		
Office and garage equipment	6,273	4,681
Less - Accumulated depreciation	1,645	656
	4,628	4,025
	$ 76,995	$ 35,856

LIABILITIES

CURRENT LIABILITIES		
Accounts payable	$ 10,213	$ 8,337
Loans and advances payable - Affiliated interests	118,000	118,000
Accrued rent expense (Note 1)	158,333	514,708
Accrued taxes - Parking	14,285	7,676
- Payroll	2,296	2,077
Accrued salaries and wages	934	709
	304,061	651,457

OPERATOR'S EQUITY (Notes 2 & 3)

DEFICIT	(227,066)	(615,601)
	$ 76,995	$ 35,856

The accompanying notes and accountants' opinion are integral parts of this statement.

ALCO PARKING CORPORATION

ALLEGHENY CENTER GARAGE

STATEMENT OF INCOME AND DEFICIT

YEARS ENDED DECEMBER 31, 1969 AND 1968

	1969	1968
PARKING SERVICE REVENUES	$ 360,176	$ 246,404
Less - City of Pittsburgh parking tax	48,013	23,931
	312,163	222,473
OPERATING EXPENSES		
Advertising		937
Depreciation	1,038	258
Insurance - General	4,724	5,092
- Employees group	6,123	5,411
Interest expense	14	
Maintenance	20,836	12,674
Office supplies and expense	780	716
Pension	3,456	2,898
Parking tag expense	4,705	2,426
Rent	356,120	279,975
Sign expense	321	793
Taxes - Payroll	5,397	4,679
- Other	1,374	
Uniform expense	1,000	1,404
Uninsured losses	31	
Utilities	37,312	31,420
Wages and salaries	91,881	83,639
	535,112	432,322
OPERATING (LOSS)	(222,949)	(209,849)
OTHER INCOME		
Miscellaneous	381	3,329
(LOSS) BEFORE EXTRAORDINARY ITEM	(222,568)	(206,520)
EXTRAORDINARY INCOME		
Adjustment by lessor of rent and other charges	611,103	
NET INCOME (LOSS)	388,535	(206,520)
(DEFICIT) - JANUARY 1	(615,601)	(409,081)
(DEFICIT) - DECEMBER 31	$(227,066)	$(615,601)

The accompanying notes and accountants' opinion are integral parts of this statement.

612a

Plaintiffs' Exhibit No. 10

ALCO PARKING CORPORATION

ALLEGHENY CENTER GARAGE

NOTES TO FINANCIAL STATEMENT

DECEMBER 31, 1969

NOTES:

1. ACCRUED RENT EXPENSE

As of June 23, 1969 the Company was in arrears in the payment of rent in the amount of $611,103 including $167,176 for the period January 1, 1969 through June 23, 1969. Under Agreement of Amendment to Operating and Lease Agreement dated June 24, 1969, the Company was released and discharged from liability for all accrued and unpaid rental prior to that date.

2. LEASE ESCROW DEPOSIT

In connection with the Agreement of Amendment to Operating and Lease Agreement, the Company, under an Escrow Agreement dated June 24, 1969, is required to deposit $450,000 in cash or securities (market value of which must be 125% of required deposit) with the Mellon National Bank and Trust Company. Marketable securities owned by officers of the Company with market value of $508,077 at December 31, 1969 have been deposited with the Escrow Agent.

3. COMMITMENTS AND CONTINGENT LIABILITIES

The Company is committed under the lease agreement for the ALLEGHENY CENTER GARAGE location through November 14, 2013 for future rental payment of approximately $14,730,000.

4. DEPRECIATION

Depreciation is computed on the estimated useful life of the assets on the straight-line method. Depreciation for the year 1969 was $1,038.

ALCO PARKING CORPORATION

ALLEGHENY CENTER GARAGE

LOANS AND ADVANCES PAYABLE

DECEMBER 31, 1969 AND 1968

	1969	1968
Affiliated interests:		
Parking Service Corporation	$ 31,000	$ 31,000
Grant-Oliver Corporation	70,500	70,500
William Penn Parking Lots	16,500	16,500
	$118,000	$118,000

614a

Plaintiffs' Exhibit No. 11

PARKING STUDY

Central Business District

PITTSBURGH, PENNSYLVANIA

1969

Prepared for

PUBLIC PARKING AUTHORITY OF PITTSBURGH

Pittsburgh, Pennsylvania

By

Wilbur Smith and Associates

June 1970

CITY OF PITTSBURGH

Mayor
Peter F. Flaherty

CITY COUNCIL

John P. Counahan, President

James A. Cortese
Thomas L. Fagan
Walter T. Kamyk
J. Craig Kuhn
John T. Lynch
Louis Mason, Jr.
Edgar W. Michaels
George W. Shields

PUBLIC PARKING AUTHORITY OF PITTSBURGH

Frederic G. Wier, Chairman

John E. Reynolds
Edward T. Pitch
Alfred M. Hunt
Louis Mason, Jr.

Joseph J. Wozniak
Executive Director

Plaintiffs' Exhibit No. 11

Wilbur Smith and Associates

CONSULTING ENGINEERS

New Haven, Conn.

June 4, 1970

Mr. Frederic G. Weir, Chairman
Public Parking Authority of Pittsburgh
1317 Investment Building
239 Fourth Avenue
Pittsburgh, Pennsylvania 15222

Dear Mr. Weir:

We are pleased to transmit our report, Parking Study, Central Business District, Pittsburgh, Pennsylvania, 1969. Parking needs and characteristics are presented herein.

There is a present deficiency of about 4,100 spaces in the survey area, which will increase to approximately 7,500 spaces based on developments currently under way. Based on other proposed projects, the deficiency is anticipated to further increase to about 10,500 by 1979. This condition can be alleviated somewhat by, among others, more complete use of the Melody Tent area east of the Civic Arena and of the parking around the Three Rivers Stadium. However, it is evident that additional permanent facilities will be required if the expected demand is to be accommodated within or adjacent to the Golden Triangle.

We appreciate the cooperation and assistance of the Authority during the prosecution of this study. In addition, we wish to acknowledge the assistance of the City of Pittsburgh Department of City Planning and Bureau of Traffic Planning and of the Southwest Pennsylvania Regional Planning Commission, for aid in the gathering of data necessary to the project.

We are pleased to have had a part in this important undertaking and trust that the material and recommendations will assist in providing the additional parking facilities in Pittsburgh.

Respectfully submitted,

Wilbur Smith and Associates

CONTENTS

CHAPTER		PAGE
1	INTRODUCTION	1
	Public Parking Authority of Pittsburgh	2
	Purpose and Scope of this Report	2
	Study Area	3
	Field Studies	3
2	PARKING SPACE INVENTORY	5
	Curb Spaces	5
	Public Lots	8
	Private Lots	9
	Public Garages	10
	Private Garages	10
	Parking Rates	10
3	PARKING CHARACTERISTICS	13
	Parking Accumulations	13
	Trip Origins	14
	Points of Entry	16
	Destinations of Motorists From Selected Lower Hill Facilities	19
	Destination of Walk-In Parkers	19
	Trip Purposes	20
	Average Parking Durations	22
	Walking Distances	22
	Office Workers	25
4	PARKING DEMANDS AND NEEDS	27
	Major Parking Generators	27
	1969 Parking Demands	28
	1969 Parking Space Surpluses and Deficiencies	29
	Effect of New and Proposed Developments	31
	1979 Parking Demands	33
	1979 Parking Space Surpluses and Deficiencies	35
	Policy Considerations	36

Plaintiffs' Exhibit No. 11

ILLUSTRATIONS

FIGURE		FOLLOWING PAGE
1	Survey Area and Authority Garages	3
2	Curb Parking	8
3	Existing Off-Street Facilities	8
4	Rate Distribution of Off-Street Parking Facilities	12
5	Accumulation of Vehicles at Authority Garages	14
6	Destination of Motorists Parking at Selected Lower Hill Facilities	19
7	Destinations of Walk-In Parkers	20
8	Major Buildings	27
9	1969 Parking Demands	29
10	1969 Parking Surplus and Deficiency	30
11	New and Proposed Developments 1969-1974	31
12	1969 Parking Surplus and Deficiency - Showing Effect of New and Proposed Buildings	32
13	1969 and 1979 Parking Demands	33
14	1979 Parking Supply and Demand	35

APPENDIX ILLUSTRATIONS

A-1	Survey Area and Block Designations	

TABULATIONS

	PAGE
Parking Space Inventory, 1969	6
Total Parking Spaces and Comparison of Equivalent Areas	7
Average Parking Rates	11
Accumulation of Parked Vehicles, Public Facilities - Typical Weekday	15
Origin of Parkers	17
Points of Entry, Parkers in the Study Area	18
Trip Purpose, Eight Authority Garages	21
Average Parking Durations, Eight Authority Garages, Typical Weekday	23
Average Walking Distances, Eight Authority Garages, Typical Weekday	24
Travel Mode Distribution, Office Workers--Pittsburgh	26
Comparison of Parking Demands and Parking Spaces Available, 1979	34

Plaintiffs' Exhibit No. 11

Chapter 1

INTRODUCTION

The development of Pittsburgh's central business district (CBD) continues to concentrate commercial, industrial, and civic activities in the Golden Triangle. The importance of adequate parking facilities in this area is exemplified by the construction of new, and the expansion of existing, garages during the past 10 years, e.g., the new Smithfield-Liberty Garage, the expanded Fort Duquesne and Sixth Street Garages (both Parking Authority facilities), and the new garage at Sixth and Penn.

Major buildings are either planned or under construction in several parts of the central business district (CBD); e.g., an office building at Gateway 6 for the Westinghouse Corporation, Pittsburgh National Bank, Two Oliver Plaza, and the new U.S. Steel Plaza.

The Crosstown Boulevard is virtually complete as far north as Bigelow Boulevard, with connections northward across the Allegheny River planned for completion by 1975. The Fort Duquesne Bridge across the Allegheny has recently been completed. Use of the Point Bridge and the Manchester Bridge has been discontinued, although the Manchester Bridge was in use during the parking study.

Public Parking Authority of Pittsburgh

The Public Parking Authority of Pittsburgh has continued its efforts to provide adequate parking facilities. Evidence of this can be seen in the additional space capacity in the CBD and in the Authority's continuing efforts to meet the growing needs of the outlying business districts.

Purpose and Scope of this Report

In 1955, a comprehensive parking survey was conducted in the central business district. The findings were presented in the report, Parking Survey, Central Business District, Pittsburgh, Pennsylvania, 1955, Volume I, Development of Parking Needs, prepared by Wilbur Smith and Associates.

In 1960, a parking survey was conducted in the northeast sector of the CBD, which was delineated in the 1955 study as the area of greatest need. The purpose of the 1960 study was to derive the 1960 and 1970 parking demands and needs for the northeast sector. The findings of this study were presented in the report, Parking Survey, Northeast Sector, Central Business District, Pittsburgh, Pennsylvania, 1960, Volume I, Development of Parking Needs, by Wilbur Smith and Associates.

Plaintiffs' Exhibit No. 11

The basic purpose of the current (1969) study was to determine the present and future parking demands and basic parking characteristics in the survey area and the adequacies of parking facilities in the various sections of the area. Also, possible sites for new parking facilities, if needed, were to be selected.

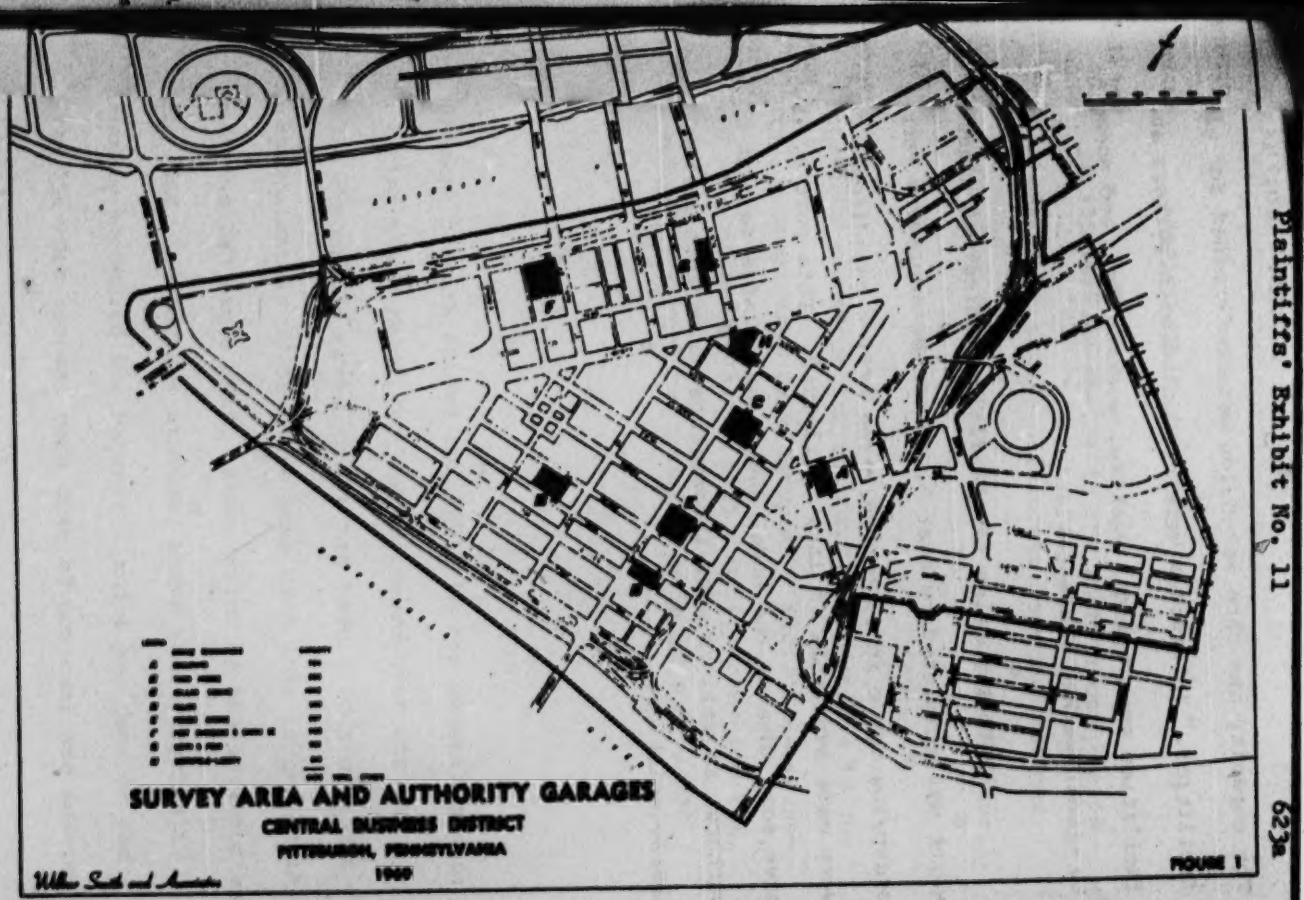
In subsequent chapters, the results of the field surveys and analysis of those data are summarized and discussed. Detailed tabulations are shown in the appendix.

Study Area

The study area included all of the Golden Triangle section of downtown Pittsburgh and that part of the Lower Hill area as far east as the new Civic Arena. More precisely, it was the downtown area between the Allegheny and the Monongahela Rivers, and bounded on the east by Liberty Bridge, Crosstown Boulevard, Forbes Avenue, Pride Street, Crawford Street, and the proposed Crosstown Boulevard to the Allegheny River. Basically, it is the 1955 study area enlarged to include the recent developments in the Lower Hill redevelopment area (Figure 1).

Field Studies

A portion of the field studies was completed in March 1969. A complete inventory was made of curb and off-street parking spaces



Plaintiffs' Exhibit No. 11

623a

The capacity and rate schedules were determined for all off-street facilities. Interviews were conducted with parkers at various facilities on a typical weekday, weekend day, and shopping night to obtain parker characteristics.

Another portion of the field studies was a questionnaire which was completed by over 5,000 office employees currently occupying space in 13 central area office buildings. These data were made available in late April 1969. This part of the survey gave some idea of the modal choice of a large segment of office workers, as well as more information on certain parker characteristics.

Chapter 2

PARKING SPACE INVENTORY

Of the 24,325 parking spaces in the study area, 23,569 ces (about 97 per cent) are in off-street lots and garages. curb spaces totalled 756, a majority of which were not avail- e during peak hours (Table 1).

For the area corresponding as nearly as possible to the 5 study area, a comparison of all types of facilities except ages show a loss of spaces since 1955. Garage construction, h private and public, resulted in a net gain of over 3,530 ces (Table 2).

b Spaces

The number of curb spaces available to the general public parking during the working day has decreased over the years. ce 1955, for comparable areas, there has been a loss of about spaces; approximately 50 of these have been lost in the north- t sector of the CBD since 1960. Examination of the inventories the 1955, 1960, and current studies, shows that curb spaces consistently accounted for between 3 and 4 per cent of the l. Of the 756 curb spaces, more than 80 per cent are metered.

626a

Plaintiffs' Exhibit No. 11

Table 1

PARKING SPACE INVENTORY
1969

TYPE	NUMBER OF SPACES	PER CENT
Curb Spaces		
30-Minute Metered	221	0.91
1-Hour Metered	340	1.40
2-Hour Metered	9	0.04
4-Hour Metered	39	0.16
20- and 30-Minute Unmetered	12	0.05
1-Hour Unmetered	135	0.55
Subtotal	756	3.11
Off-Street Spaces		
Private Lots	1,145 (1)	4.71
Metered Area-Penn Central Railroad Station	46 (2)	0.19
Private Garages	1,231	5.06
Public Lots	8,922 (1) (3)	36.68
Public Garages	6,119	25.15
Authority Garages	6,106	25.10
Subtotal	23,569 (4)	96.89
TOTAL	24,325	100.00

(1) Open aisles capacity shown unless operation is invariably full aisles.
(2) Includes 32 privately owned meters and 14 reserved spaces.
(3) Does not include the 122-space Civic Arena West Lot, which is used only by special arrangement.
(4) Subtotal does not include the following facilities under construction or renovation: U.S. Steel Plaza, 600 spaces including 10 private spaces; Westinghouse Building, 200 private-300 public spaces; and, Rossman Building, 250 spaces, allocation undetermined.

Table 2

TOTAL PARKING SPACES AND
COMPARISON OF EQUIVALENT AREAS

STUDY	TYPE PARKING SPACES: Private	Public	Total	Total Garages	Total Off-Street	Curb	GRAND TOTAL
1955	1,459	6,701	8,160	6,102	14,262	568	14,830
1969	1,191	8,922	10,113	13,456	23,569	756	24,325
	COMPARISON OF EQUIVALENT AREAS						
1969 - 1955	(624)	(421)	(1,045)	4,739	3,694	(158)	3,536

NOTE: Figures in parentheses indicate greater values in earlier studies, i.e., in 1969 there were 624 fewer spaces in private lots than in the equivalent 1955 area.

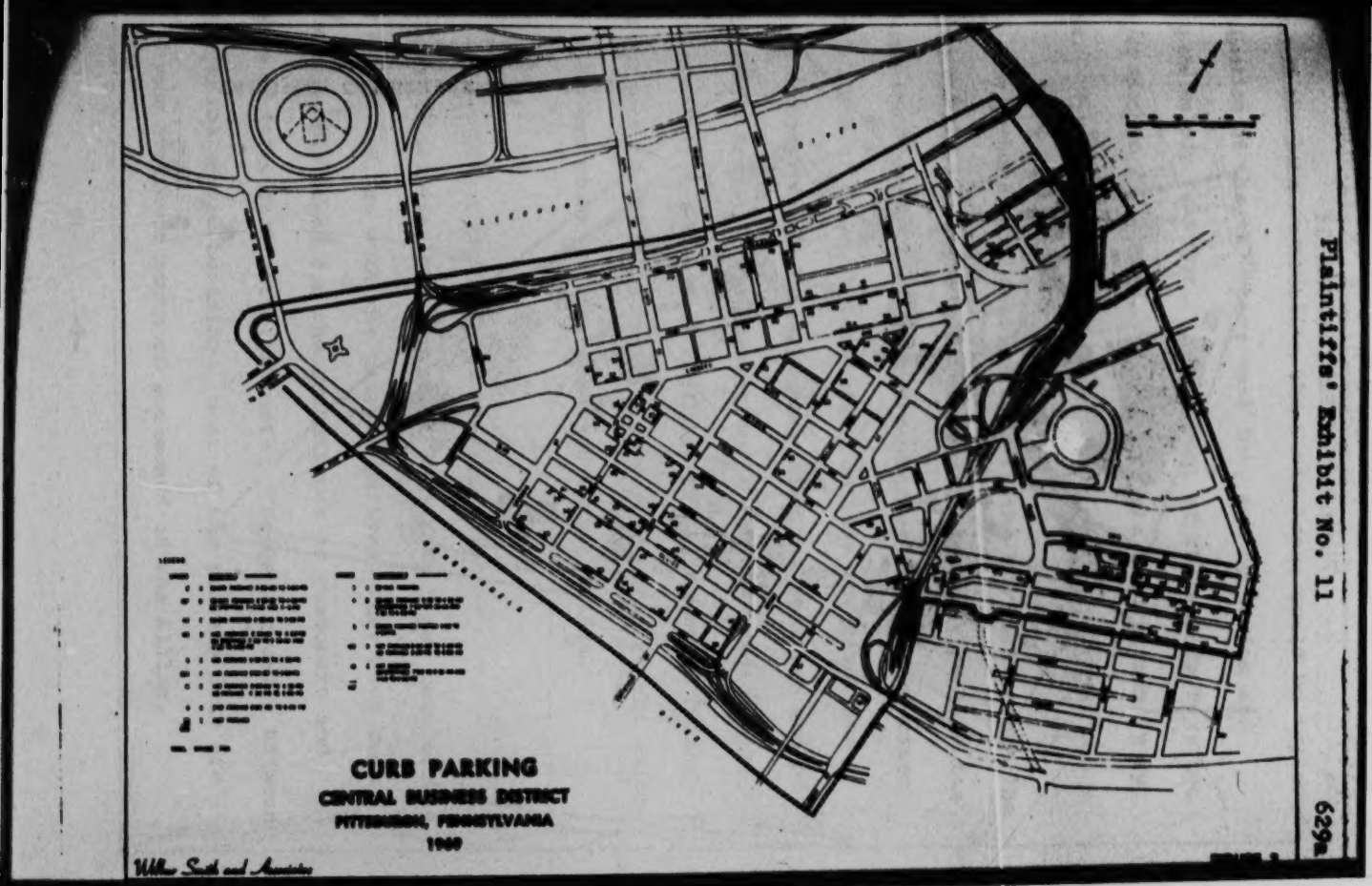
EXHIBIT NO. 11
02/84

Most of the metered spaces are in that part of the CBD west of Crosstown Boulevard, while the majority of the nonmetered space is on the north and south sides of Colwell Street near the Civic Arena (Figure 2).

Public Lots

Public lots are located generally toward the periphery of the study area outside the triangle formed by Liberty, Forbes, and Grant Streets. As in previous studies, the character of use varies generally from short-term parkers for those lots just outside the core, to all-day parkers for the lots further from Forbes and Liberty Avenues (Figure 3). The nearly 80 public lots include almost 9,000 spaces, or over 36 per cent of the study area total.

The Lower Hill redevelopment area is adjacent to the CBD. The temporary lots which existed along Bedford and Webster Avenues in 1960 have been displaced by redevelopment, especially by the construction of the Crosstown Boulevard and the Civic Arena. Surrounding the Civic Arena are four paved lots and one unpaved lot, the "Melody Tent" area, which lies east of, and adjacent to the East Lot. The North, South, East, and Melody Tent Lots have a capacity of approximately 2,030 spaces. Potentially, the



Plaintiffs' Exhibit No. 11

629

Plaintiffs' Exhibit No. 11

ity of the lots surrounding the Civic Arena could be expanded ilisation of the 122-space West Lot, and by paving and g the Melody Tent Lot. Improvement of the Melody Tent Lot add another 200 spaces. These lots are used primarily by rs.

Many parkers with destinations in the CBD park across the heny and the Monongahela Rivers can either walk or take the cross the rivers. The largest number of these trans-river s is north of the Allegheny River between the river and heny Center, with a lesser number near the southern end of mithfield Bridge. The completion of the new stadium will pproximately 4,500 spaces north of the Allegheny. During -hour peak period, 300 "walk-ins" were counted on the Smith- Bridge and about 950 on the Sixth Street Bridge.

te Lots

The 44 private lots represent less than 5 per cent of the spaces, and, as with the private garages, they have been loped in most cases for the convenience of customers and yees of individual establishments. They are usually adjacent lose to the served building. Most of the private lots are of Penn Avenue or south of Boulevard of the Allies.

Public Garages

The 8 Authority and 13 non-Authority garages in the study area provide over 12,200 parking spaces, or about 50 per cent of the study area total. Over 6,100 of these spaces are in the Authority garages. The Chatham Center Garage, with about 2,200 spaces, has the highest capacity of any of the public garages.

Private Garages

The capacity of the private garages is about 1,200 spaces or 5 per cent of the total. These garages are used primarily for customers, employees, or tenants of the buildings which they serve.

Parking Rates

The parking rates for public lots and garages vary with location. Generally, those facilities farthest from the core have the lowest rates. The average rate of 20 public lots, 8 public garages, and 8 Authority garages are summarized in Table The 1-hour fee in Authority garages is $0.35, or about one-half that in the non-Authority garages and public lots. The 2- and 3-hour rates are also appreciably lower, with the all-day rate being $0.24 to $0.38 less than the average of the non-Authority

Table 3

AVERAGE PARKING RATES

ERVAL	PUBLIC LOTS (1)	PUBLIC GARAGES (2)	PARKING AUTHORITY GARAGES (3)
our	$0.63	$0.70	$0.35
ours	0.97	0.92	0.51
ours	1.25	1.15	0.83
-Day	1.97	2.11	1.73

20 public lots.
Eight public garages.
Eight Parking Authority garages.

Plaintiffs' Exhibit No. 11

Table 3

AVERAGE PARKING RATES

INTERVAL	PUBLIC LOTS (1)	PUBLIC GARAGES (2)	PARKING AUTHORITY GARAGES (3)
1-Hour	$0.63	$0.70	$0.35
2-Hours	0.97	0.92	0.51
3-Hours	1.25	1.15	0.83
All-Day	1.97	2.11	1.73

(1) 20 public lots.
(2) Eight public garages.
(3) Eight Parking Authority garages.

...ilities. Self-parking characterizes the Authority garages, ...le the other public facilities continue to be almost entirely ...endant-operated.

Off-street lots and garages generally east of Crosstown ...levard, east of Tenth Street, and north of Penn Avenue have ... lowest rates, while the highest rates are for those facilities ...rest the core (Figure 4). This pattern, to some extent, serves ...discourage all-day parking in those facilities nearest the ... retail establishments.

Plaintiffs' Exhibit No. 11

Chapter 3

PARKING CHARACTERISTICS

Many factors motivate the parker's selection of a parking ce. These include the availability of a space near his primary tination, the traffic regulations in the vicinity of the rking facilities, walking distance to his destination, his tended parking duration, and parking rates.

Parker interviews were conducted at public off-street cilities, with emphasis on the Authority garages and other incipal facilities.

Interviews were also conducted on the CBD side of the n Street and Smithfield Street Bridges with those who parked ross the Allegheny and Monongahela Rivers and walked to the ntral business district. In addition, a separate survey of rking characteristics was made of over 5,000 office workers ployed in the Golden Triangle.

rking Accumulations

The peak accumulation did not occur in all facilities at same time. However, the greatest accumulation of parkers for overall study area was reached about 2:00 P.M. The sum of

Plaintiffs' Exhibit No. 11

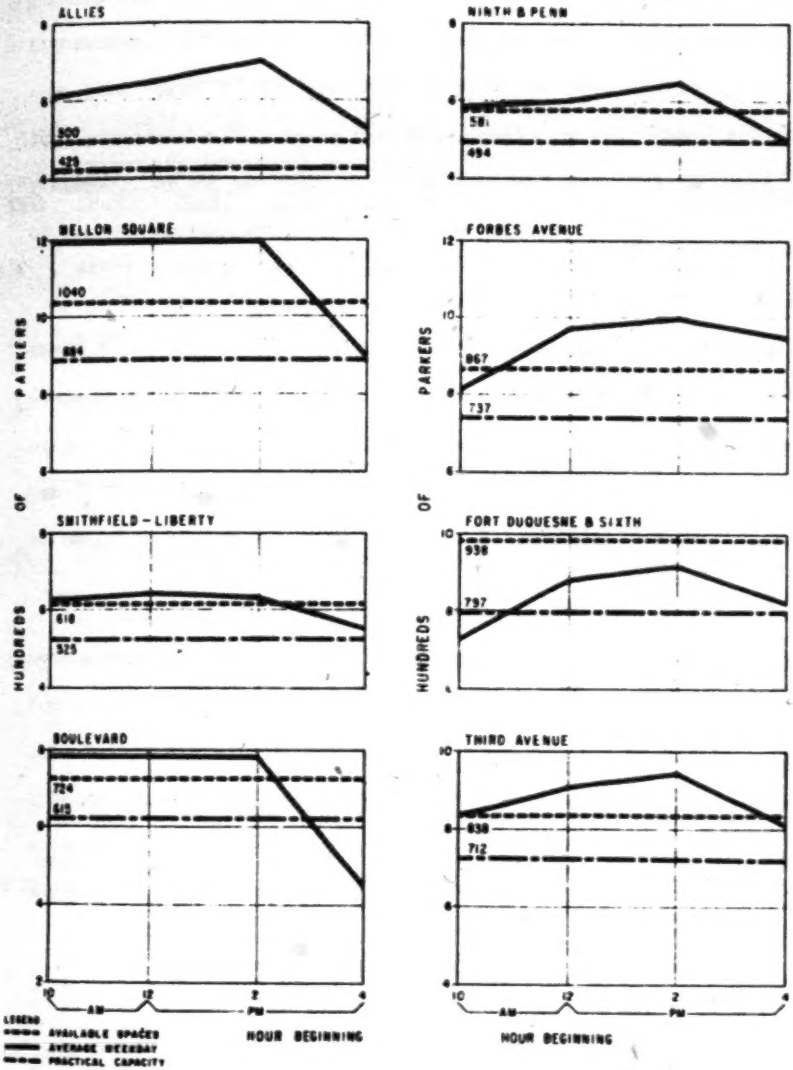
the peak accumulation of all parkers, including the walk-ins who park across the rivers, reached about 25,500 during the survey.

During the survey, all but the Fort Duquesne-Sixth Avenue Garage were operating over their "clear aisles" capacity. This over-use is possible since aisle parking is permitted. This practice reduces the operating efficiency of the garage and tends to increase operating costs because of the additional personnel needed to shuffle cars during the busy period of the day. In most of the Authority facilities, the aisles start to empty after 2:00 P.M.; this was found to be fairly typical of most of the public off-street facilities in which aisle parking was permitted. The accumulations of Authority garages are presented in Figure 1.

A comparison of the per cent of spaces occupied with similar data from the 1960 study indicates higher occupancy during the current survey. The data show that the percentage of spaces occupied was about 10 per cent higher throughout the day in the Authority garages than in other public facilities (Table 4).

Trip Origins

Approximately 33 per cent of the parkers had origins within the City of Pittsburgh with the majority living between the Allegheny and Monongahela Rivers. Over 54 per cent of all



ACCUMULATION OF VEHICLES AT AUTHORITY GARAGES

CENTRAL BUSINESS DISTRICT

PITTSBURGH, PENNSYLVANIA

1960

FIGURE 5

640a

Plaintiffs' Exhibit No. 11

Table 4

ACCUMULATION OF PARKED VEHICLES

Public Facilities - Typical Weekday

FACILITIES	TIME 10:00 A.M.	12:00 Noon	2:00 P.M.	4:00 P.M.	CAPACITY
Authority Garages					
Accumulations	6,216	6,666	6,849	5,544	6,106
Per Cent of Spaces Occupied	101.8	109.2	112.2	90.8	
Other Public Facilities(1)					
Accumulations	13,595	14,871	14,974	12,208	15,101
Per Cent of Spaces Occupied	90.0	98.5	99.2	80.8	
All Public Facilities(1)					
Accumulations	19,811	21,537	21,823	17,752	21,207
Per Cent of Spaces Occupied	93.4	101.6	102.9	83.7	

(1) Includes lots and garages.

NOTE: Accumulations can exceed the open aisles capacity since parking in the aisles is permitted at most of the facilities.

parkers gave an Allegheny County zip code outside the City of Pittsburgh. Of these Allehgeny County parkers, about one-third came from north of the Allegheny-Ohio River line, one-fourth from between the Allegheny and Monongahela Rivers, while the remainder, or 22 per cent of total parkers, had origins south of the Monongahela-Ohio River line (Table 5).

The 1969 percentage of parkers from Allegheny County is about 3 per cent higher than in 1960. This follows the observed movement of population from the city to the suburbs. The greater percentage of parkers from the south is indicative of the urban growth in the southern part of Allegheny County and the orientation of those people to the CBD.

Points of Entry - The most frequently named routes utilized in entering the CBD were Boulevard of the Allies Corridor (which includes the Penn-Lincoln Parkway-East and the bridges up the Monongahela River) and the Fort Pitt Bridge (Table 6). The Liberty Avenue Corridor included those parallel routes and the bridges over the Allegheny River upstream from the Ninth Street Bridge.

Table 5

ORIGIN OF PARKERS

LOCATION[1][2]	PURPOSE									
	Shopping		Business		Work		Other		TOTAL	
	Number	Per Cent	Number	Per Cent	Number	Per Cent	Number	Per Cent	Number	Per Cent
City of Pittsburgh										
North of the Rivers[3]	54	1.7	176	3.1	466	4.1	20	1.3	716	3.3
Between the Rivers[4]	785	24.4	972	17.1	2,078	18.0	217	14.1	4,052	18.4
South of the Rivers[5]	316	9.8	622	11.0	1,445	12.5	213	13.8	2,596	11.8
Allegheny County Outside City of Pittsburgh										
North of the Rivers[3]	582	18.1	955	16.8	2,345	20.3	284	18.5	4,166	19.0
Between the Rivers[4]	359	11.1	771	13.6	1,611	14.0	175	11.4	2,916	13.3
South of the Rivers[5]	725	22.5	1,282	22.6	2,588	22.5	297	19.3	4,892	22.3
Surrounding Counties										
Beaver	64	2.0	89	1.6	91	0.8	8	0.5	252	1.1
Washington	14	0.4	39	0.7	72	0.6	4	0.3	129	0.6
Westmoreland	68	2.1	66	1.2	173	1.5	60	3.9	367	1.7
Other Locations and Unknown	253	7.9	697	12.3	660	5.7	260	16.9	1,870	8.5
TOTAL	3,220	100.0	5,669	100.0	11,529	100.0	1,538	100.0	21,956	100.0

(1) Does not include parkers using private facilities.
(2) Represents peak-hour parkers.
(3) North of the Allegheny and Ohio Rivers.
(4) Between the Allegheny and Monongahela Rivers.
(5) South of the Monongahela and Ohio Rivers.

Table 6

POINTS OF ENTRY

Parkers in the Study Area

ROUTE OF ENTRY	NUMBER OF PARKERS	PER CENT
Manchester Bridge	613	3.0
Sixth Street Bridge	1,008	4.9
Ninth Street Bridge	1,239	6.0
Liberty Avenue	1,454	7.0
Bigelow Boulevard	1,869	9.0
Forbes Avenue (1)	289	1.5
Boulevard of the Allies (2)	5,539	26.7
Liberty Bridge	2,590	12.5
Smithfield Bridge	461	2.2
Fort Pitt Bridge	4,918	23.7
Unknown	723	3.5
TOTAL	20,730 (3) (4)	100.0

(1) Includes Fifth Avenue.
(2) Includes Parkway East, and the bridges up the Monongahela River.
(3) Represents peak-period parkers.
(4) Does not include parkers using private facilities.

Plaintiffs' Exhibit No. 11

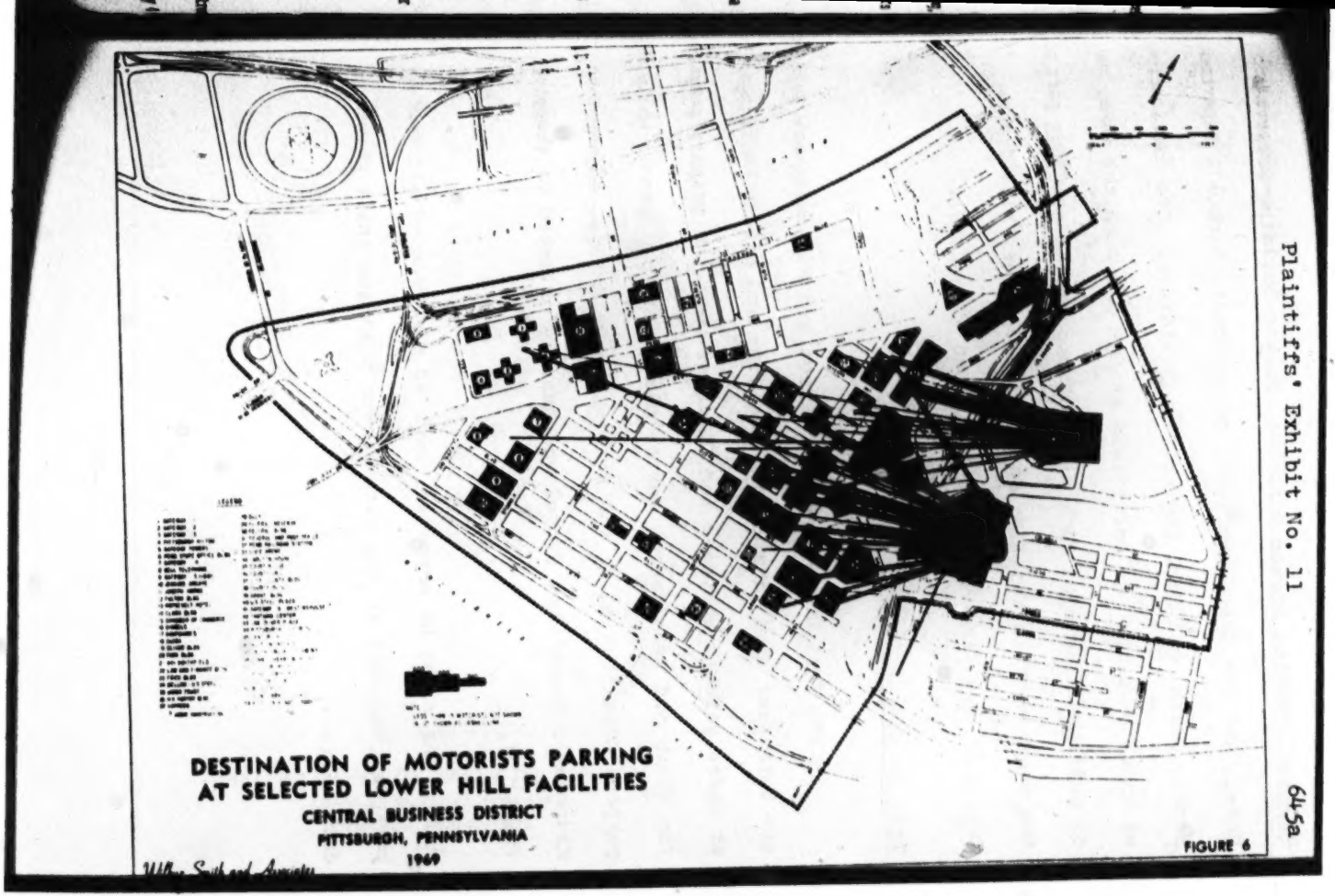
Destinations of Motorists from Selected Lower Hill Facilities

Generally, the destinations of parkers using the Chatham Center and Civic Arena facilities extend west to Smithfield Street and south to Forbes Avenue (Figure 6). However, some of the Civic Arena parkers worked as far away as Gateway Center. Principal destinations for Civic Arena parkers were the Arena facilities, the Union Trust Building, Mellon-U.S. Steel Building, State Office Building, Gateway 4-Bell Telephone Complex, Koppers Building, and the Federal, Gulf, and Post Office Buildings. Chatham Center parkers were also going to the Gateway Center. In addition to many of the same destinations as the Civic Arena parkers, principal destinations of the Chatham Center parkers include the blocks containing the County, Grant, City-County Courthouse, Robert Morris Junior College Buildings, as well as activities in Chatham Center.

A comparison with the destinations found at Lower Hill lots in 1960 indicates that the 1969 day parkers walked farther from the parking facility.

Destinations of Walk-In Parkers

Principal destinations of parkers crossing the Sixth Street Bridge were Gateway Center, State Office-Bell Telephone-Gateway



Plaintiffs' Exhibit No. 11

645a

Complex, Jenkins Arcade Building, Fulton Building-Roosevelt Hotel, and the 441 Smithfield, Union Trust, Gimbel's Department Store, Clark, and Rust Engineering Buildings. The destinations of those crossing the Smithfield Bridge are much the same, and, in addition, included such destinations in the southern part of the study area as the IBM, Park Point College, Blue Cross, Equitable Gas, and the Grant Buildings (Figure 7).

Trip Purposes

The Fort Duquesne-Sixth Street and Mellon Square Garages are both near a major shopping facility and office buildings; at these garages shopping and business were the primary purposes. The Ninth and Penn Garage serves places of employment; while the purpose distribution at the Forbes Avenue Garage, adjacent to Kaufmann's Department Store, was heavily oriented to shopping (Table 7).

As might be expected, over 80 per cent of all walk-in parkers gave work as the purpose for visiting their primary destinations.

DESTINATIONS OF WALK-IN PARKERS
CENTRAL BUSINESS DISTRICT
PITTSBURGH, PENNSYLVANIA
1969
Wilbur Smith and Associates

Table 7

TRIP PURPOSE

Eight Authority Garages

FACILITY	TRIP PURPOSE									
	Shopping		Business		Work		Other		TOTAL	
	Number	Per Cent	Number	Per Cent	Number	Per Cent	Number	Per Cent	Number	Per Cent
Fort Duquesne-Sixth Street (1)	330	36.6	381	42.2	132	14.6	60	6.6	903	100.0
Smithfield-Liberty Avenue (1)	131	20.4	201	31.4	259	40.5	49	7.7	640	100.0
Mellon Square (1)	412	34.3	533	44.4	241	20.1	14	1.2	1,200	100.0
Forbes Avenue (1)	506	50.6	270	27.1	184	18.5	39	3.8	999	100.0
Ninth and Penn Avenue	41	6.0	224	32.7	395	57.7	24	7.7	684	100.0
Boulevard	120	15.3	397	50.7	256	32.7	10	1.3	783	100.0
Third Avenue	112	12.0	211	22.5	494	52.8	117	12.7	934	100.0
Boulevard of the Allies	163	23.1	130	18.5	339	48.2	72	10.2	704	100.0
All Public Facilities	3,198	15.4	5,570	26.9	10,523	50.8	1,439	6.9	20,730	100.0
Walk-In Parkers	22	1.8	98	8.0	989	80.7	117	9.5	1,226	100.0
TOTAL (2)	3,220	14.7	5,668	25.8	11,512	52.4	1,556	7.1	21,956	100.0

(1) Store-oriented garages.
(2) Represents peak-period parkers.

0408 Plaintiffs' Exhibit No. 11

Shoppers Parking Durations

The average duration for all facilities was 5 hours, 41 minutes, and for the Authority garages, it ranged between 3 hours, minutes and 6 hours, 40 minutes. As in the 1960 survey, duration for shoppers did not vary greatly at the eight garages, although durations at those garages farther from the major department stores were greater than the average for all facilities. This average duration of 2 hours, 50 minutes was not appreciably different than the 2 hours, 42 minutes found during the 1955 survey (Table 8).

Walking Distances

The distance parkers are willing to walk varies with, among other factors, the purpose at his primary destination. The distribution of walking distances for all public facilities also shows this, but varies with location for the individual garages (Table 9). For example, the Ninth-Penn and Third Avenue Garages are near no major shopping facilities, but are near several office buildings. This location is reflected in the longer walking distances for shopping and the shorter distances for business and work purposes. Conversely, the

Plaintiffs' Exhibit No. 11

Table 8

AVERAGE PARKING DURATIONS

EIGHT AUTHORITY GARAGES

Typical Weekday

FACILITY	TRIP PURPOSES				ALL PURPOSES
	Shop	Business	Work	Other	
Fort Duquesne-Sixth Street(1)	2 Hr. 19 Min.	3 Hr. 11 Min.	6 Hr. 28 Min.	2 Hr. 52 Min.	3 Hr. 20 Min.
Smithfield-Liberty Avenue(1)	2 Hr. 45 Min.	3 Hr. 13 Min.	7 Hr. 58 Min.	4 Hr. 27 Min.	5 Hr. 08 Min.
Forbes Avenue(1)	2 Hr. 40 Min.	2 Hr. 31 Min.	6 Hr. 28 Min.	3 Hr. 46 Min.	3 Hr. 22 Min.
Mellon Square(1)	2 Hr. 41 Min.	3 Hr. 53 Min.	7 Hr. 28 Min.	1 Hr. 56 Min.	4 Hr. 08 Min.
Ninth and Penn Avenue	3 Hr. 08 Min.	3 Hr. 49 Min.	7 Hr. 37 Min.	6 Hr. 12 Min.	6 Hr. 40 Min.
Boulevard	2 Hr. 31 Min.	3 Hr. 46 Min.	7 Hr. 14 Min.	3 Hr. 30 Min.	4 Hr. 42 Min.
Third Avenue	3 Hr. 02 Min.	3 Hr. 55 Min.	7 Hr. 32 Min.	4 Hr. 05 Min.	4 Hr. 41 Min.
Boulevard of the Allies	3 Hr. 16 Min.	3 Hr. 41 Min.	7 Hr. 57 Min.	4 Hr. 03 Min.	5 Hr. 41 Min.
All Public Facilities	2 Hr. 50 Min.	3 Hr. 11 Min.	7 Hr. 58 Min.	4 Hr. 56 Min.	5 Hr. 41 Min.

(1) Store-oriented garages.

Table 9

AVERAGE WALKING DISTANCES

EIGHT AUTHORITY GARAGES

Typical Weekday

FACILITY	TRIP PURPOSE				ALL PURPOSES (feet)
	Shop (feet)	Business (feet)	Work (feet)	Other (feet)	
Fort Duquesne-Sixth Street(1)	486	739	847	675	658
Smithfield-Liberty Avenue(1)	342	572	545	408	522
Forbes Avenue(1)	525	644	581	1,035	587
Mellon Square(1)	516	512	447	304	498
Ninth and Penn Avenue	1,390	700	700	1,102	755
Boulevard	1,022	859	983	705	922
Third Avenue	1,275	725	769	424	780
Boulevard of the Allies	968	996	705	715	821
All Public Facilities	838	656	928	703	825

(1) Store-Oriented garages

Smithfield-Liberty, Forbes Avenue, and Fort Duquesne-Sixth Street Garages are near major department stores (Horne's, Kaufmann's, and Gimbel's) which result in a shorter walk for shoppers than for business and work.

Office Workers

A survey was made of approximately 5,500 office workers employed in several office buildings in the study area. As shown in Table 10, 36 per cent of the total workers drove an auto while about 15 per cent were auto passengers. Mass transit accommodated 45 per cent of the workers, while the remaining 3.1 per cent came by taxi, walking, or some other means.

Table 10

TRAVEL MODE DISTRIBUTION
Office Workers--Pittsburgh

MODE	NUMBER	PER CENT
Auto		
Driver	1,984	36.3
Passenger	851	15.6
Subtotal	2,835	51.9
Mass Transit		
Bus	1,870	34.2
Trolley	590	10.8
Subtotal	2,460	45.0
Other		
Taxi	12	0.2
Walk	85	1.5
Miscellaneous	76	1.4
Subtotal	173	3.1
TOTAL	5,468	100.0

Plaintiffs' Exhibit No. 11

Chapter 4

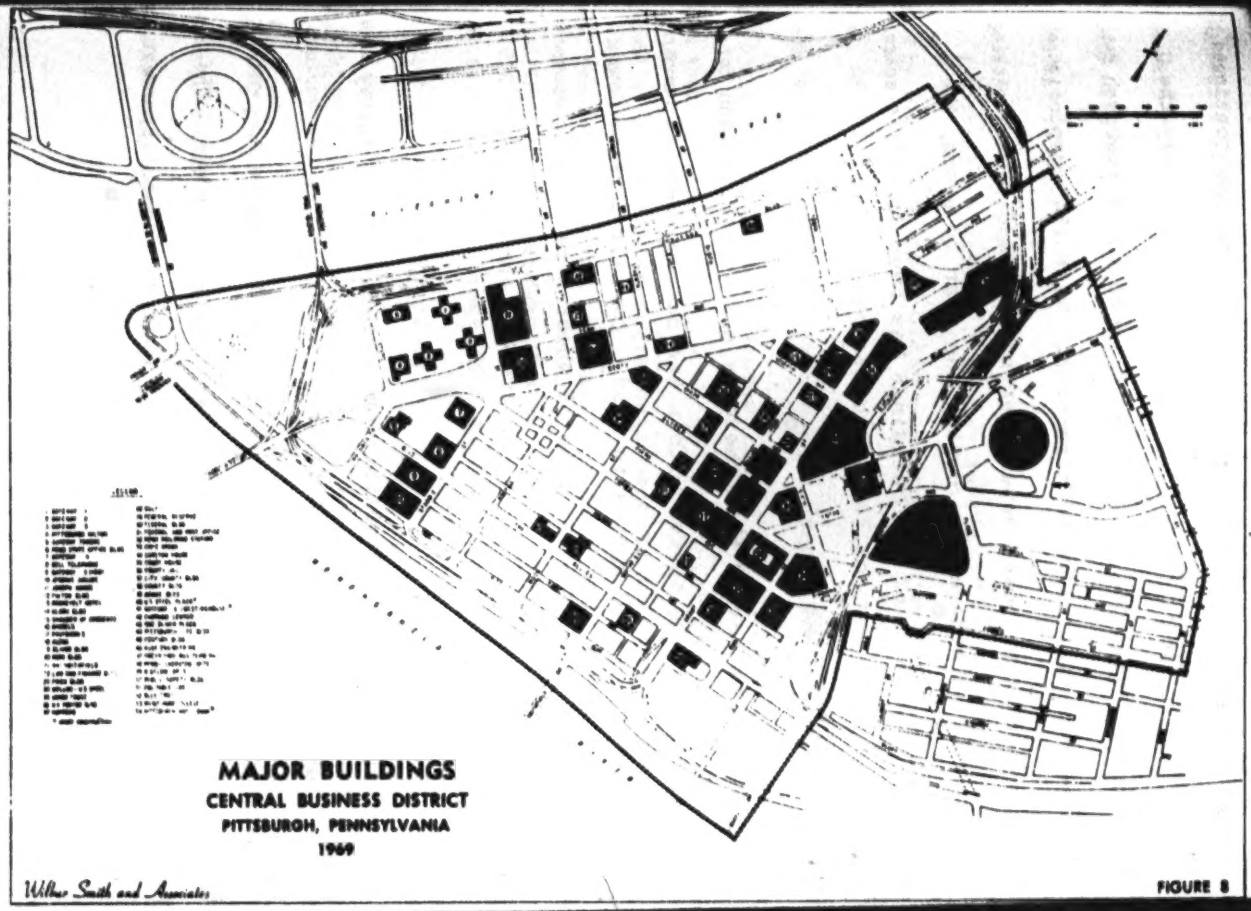
PARKING DEMANDS AND NEEDS

Existing parking needs in the study area were determined by comparing the available supply with parking demands. These needs have been developed for 1969 and projected to 1979, based upon anticipated growth in the Golden Triangle.

Major Parking Generators

Many of Pittsburgh's major office buildings, banks, department stores, hotels, and government buildings are located in the Golden Triangle. Chatham Center and the Civic Arena lie to the east of Crosstown Boulevard in the Lower Hill redevelopment area. The locations of these and other major buildings are depicted in Figure 8.

Since 1955 there has been a noticeable increase in the development of office space in the survey area. The Federal Building, Federal Reserve Building, and H. K. Porter Building have been constructed along Grant Street. One Oliver Plaza has been built on Liberty Avenue, and several additional buildings have been developed in the Point area (Gateway 4, 5, and 6). The activities of these buildings have generated the major portion of the parking demand and make up a substantial part of the more than 31 million net rentable square feet of floor area in the Triangle.



MAJOR BUILDINGS
CENTRAL BUSINESS DISTRICT
PITTSBURGH, PENNSYLVANIA
1969

Wilbur Smith and Associates

FIGURE 8

Plaintiffs' Exhibit No. 11

655a

Plaintiffs' Exhibit No. 11

The provision of additional floor area has continued to increase at a rapid rate. At the time of this survey the U. S. Steel Plaza, Westinghouse (Gateway 6), and the Pittsburgh National Bank Building were under construction. With the completion of these and other proposed developments, many additional parking demands will be generated. During the past 14 years, the primary development of new buildings has been in office space.

1969 Parking Demands

It is estimated that there is now a total demand for about 25,500 parking spaces within the survey area, as compared to a demand of 16,500 spaces in 1955. Overall parking demands have increased at an annual rate of about 3 per cent compounded during this 14-year period, as an average annual rate of 3.9 per cent.

Parking demand distribution patterns in the survey area were determined through interviews with parkers at the various facilities and for people parking across the rivers and walking across the Sixth Street and Smithfield Street Bridges. The parking demands were based on a peak period; accumulations at t

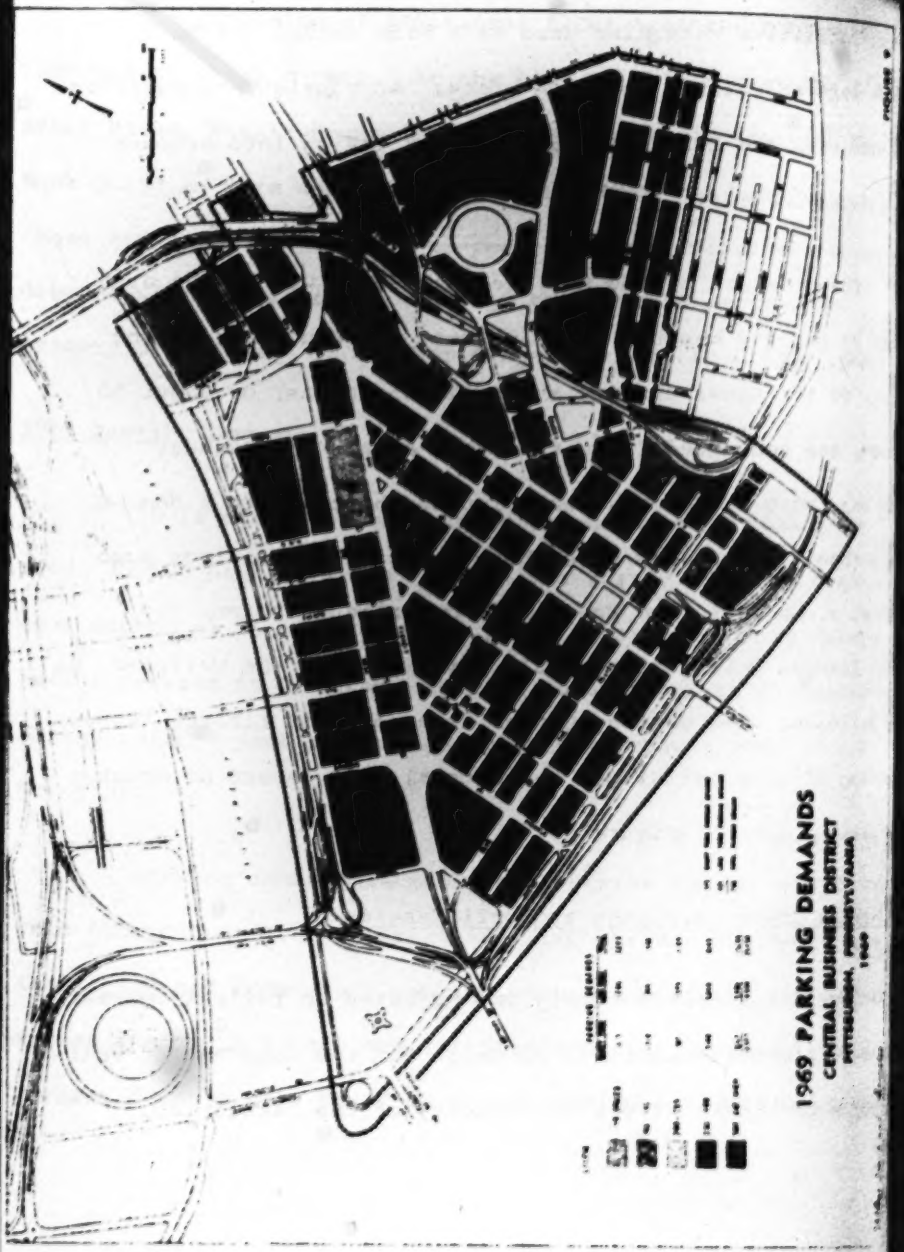
ious facilities were also used as a base value. Parking nds were calculated for each block. Appropriate comparisons e made with the 1955 and 1960 surveys, taking into account land-use changes.

The greatest demand has been developed within the area nded by Liberty Avenue, Grant Street, and Boulevard of the ies. Of the total demand, about 12,645 spaces, or about 50 cent, are accounted for within this area. The highest nd was found at Gateway Center; other blocks with a demand ore than 1,000 spaces were those containing buildings such imbel's, Horne's, and Kaufmann's Department Stores, the ral Reserve Building, the Gulf Building, and the Mellon-U. S. l Building. The Gateway Center area north of Liberty Avenue, isting of five buildings, had a total 1969 demand of about 0 parking spaces (Figure 9).

Parking Space Surpluses and Deficiencies

The parking space supply was adjusted to reflect operating ciency, since fluctuations in usage and the movement of vehi- reduce the total effective capacity of the facilities.

Plaintiffs' Exhibit No. 11



ficiency factors of 85 per cent for public garages and 90 per
t for curbs, lots, and garages were applied to the 24,369-
ce capacity to derive the total adjusted supply of 21,338
ces.

parking space surplus and deficiencies were determined
relating the adjusted supply to the existing parking demands;
s, an overall deficiency of 4,121 spaces was established.
highest surpluses were in those blocks containing major
king facilities, while the greatest deficiencies are in
se blocks containing such major generators as Gateway Center,
ne's, Gimbel's, and Kaufmann's Department Stores, Federal
lding, Post Office, and the Mellon-U. S. Steel Building
gure 10).

The lots at the Civic Arena and the large garage at
ham Center have added over 3,600 spaces to the adjusted
ly since the 1960 survey; a material contribution to
viating the overall deficiency.

The 4,100 adjusted space deficiency, which would require
oximately 4,700 actual spaces, indicates a substantial need
additional spaces. This would indicate an actual increase of
t 20 per cent above the present parking capacity.

Plaintiffs' Exhibit No. 11

Effect of New and Proposed Developments

Those buildings which were under construction or renovation at the time of the survey and those planned for completion in the next 5 years are depicted in Figure 11. The U. S. Steel Plaza, the Pittsburgh National Bank Building and Gateway 6 (Westinghouse) were under construction, and the Koseman Building was in the process of being renovated. Other potential developments likely to be under way in the near future are Penn Central Park, the Methodist Union Building, the Bell Telephone Equipment Building Two Oliver Plaza, and the first phase of the Law and Government Center near Third Avenue and Grant Street.

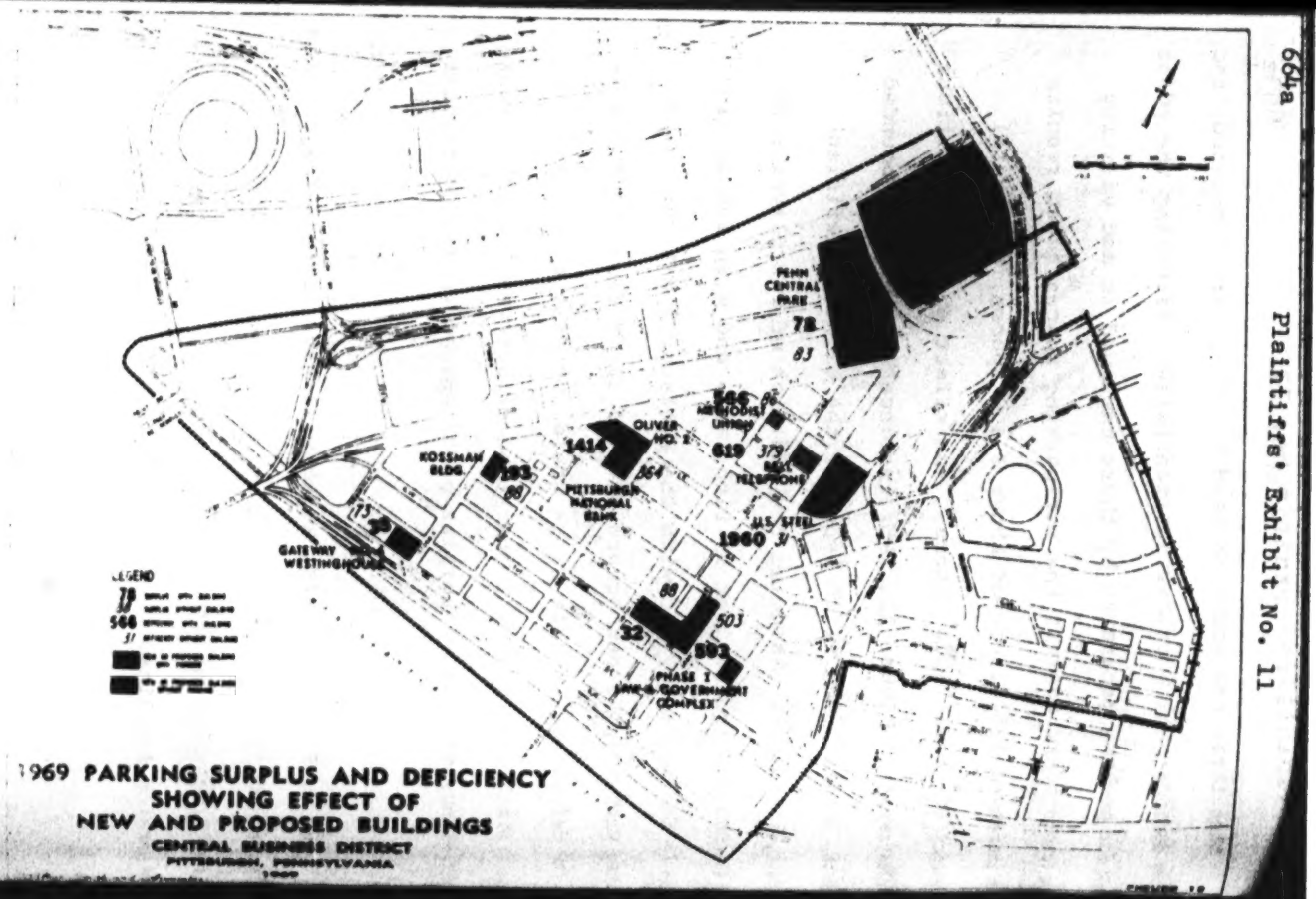
Although it is realized that the full development of Penn Central Park will take place over many years, for the purposes of this study it is assumed that construction by 1974 between Tenth Street and the Crosstown Boulevard will consist of two office buildings totaling 1,200,000 net square feet, two department stores totaling 200,000 square feet, a 200,000-square-foot exhibition hall, a 600-800 room hotel, and assorted retail and entertainment facilities of 200,000 square feet. A peak-hour demand of about 3,380 parking spaces is estimated for this phase of Penn Central Park.

662a

Plaintiffs' Exhibit No. 11

When these new and renovated buildings are completed, the ...king demands will increase substantially. Balancing the added ...and for parking generated by those employed in and visiting ...se developments against the net parking spaces added results ...an increased deficiency of about 3,300 spaces, or a total ...ficiency of about 7,500 spaces. The effect of these additions ...illustrated in Figure 12. For instance, in the area bounded ...Sixth, Liberty, and Fifth Avenues, the existing deficiency ...about 365 spaces. Assuming the addition of Two Oliver Plaza ...h 455,000 net square feet of floor area and with 200 parking ...ces in the basement, and with the Pittsburgh National Bank ...lding with 570,000 net square feet of floor area and no park-..., the deficiency in this block would increase to about 1,415 ...ces. Similarly, the full operation of Gateway 6 will decrease ... deficiency of 75 to a surplus of 35 spaces in its particular ...ck.

The U. S. Steel Plaza, which will have more than 2 million ...re feet of floor area, is estimated to have a demand in ...ss of 2,400 parking spaces and a capacity of only 600 spaces ...he parking facility.



1969 PARKING SURPLUS AND DEFICIENCY
SHOWING EFFECT OF
NEW AND PROPOSED BUILDINGS
CENTRAL BUSINESS DISTRICT
PITTSBURGH, PENNSYLVANIA
1969

In summary, there is an existing deficiency of 4,100 ing spaces which would increase to 7,500 spaces based on the lopments currently under way.

Parking Demands

Future parking demands have been calculated based on known -use changes and normal increases in demand which would vary ector of the study area.

Plans for known construction indicate there are about 200 re feet per employee in new office buildings. The 1979 ing demands have been calculated for each block in the survey based upon the reported floor area of each building proposed development. The estimated demands are based on new and osed developments and anticipated normal increase, when ined, this would result in a total 1979 demand of about 36,000 es, or an increase of 10,500 spaces above the existing 1969 ls. This represents an increase of 41 per cent, or an ge annual rate of about 3.5 per cent. Development of the ng demands is presented by sector in Table 11.

The comparison of the 1969 and 1979 parking space demand ajor increases for Sectors III, IV, and V are depicted in e 13.

Plaintiffs' Exhibit No. 11

Table 11

COMPARISON OF PARKING DEMANDS AND PARKING SPACES AVAILABLE
1979

SECTOR	PARKING DEMANDS: 1969 Demand	Building Additions To 1979 (1)	Normal Increase To 1979	Estimated 1979 Demand	ADJUSTED PARKING SUPPLY: 1969 Adjusted Supply	Known Changes (2)	1979 Estimated Supply	DIFFERENCE: 1979 Demand Minus 1979 Adj. Supply
I	3,263	400	324	3,987	1,993	450	2,443	(1,544) (3)
II	3,616	0	177	3,793	2,989	0	2,989	(804)
III (4)	447	3,380	(221)	3,606	1,292	2,392	3,684	78
IV	7,279	1,950	708	9,937	1,844	180	2,024	(7,913)
V	1,224	2,470	60	3,754	1,415	540	1,955	(1,799)
VI	1,524	0	152	1,676	5,065	0	5,065	3,389
VII	4,398	600	216	5,214	3,071	823	3,894	(1,320)
VIII	2,281	170	114	2,565	1,681	(90)	1,591	(974)
IX	1,427	0	72	1,499	1,988	(90)	1,898	399
TOTAL	25,459	8,970	1,602	36,031	21,338	4,205	25,543	(10,488)

(1) Represents the increase in parking demands generated by employees in the developments under construction or proposed for the area.

(2) Represents the estimated changes in the adjusted parking supply because of new or proposed construction in the area. It is assumed that the present parking supply will not change unless displaced by new developments.

(3) Figures in parentheses are negative; a parking supply deficiency is estimated in all sectors but Sectors III, VI, and IX for 1979.

(4) It is assumed that the parking supply in the Penn Central Park area will no more than satisfy the demands in that development.

Plaintiffs' Exhibit No. 11

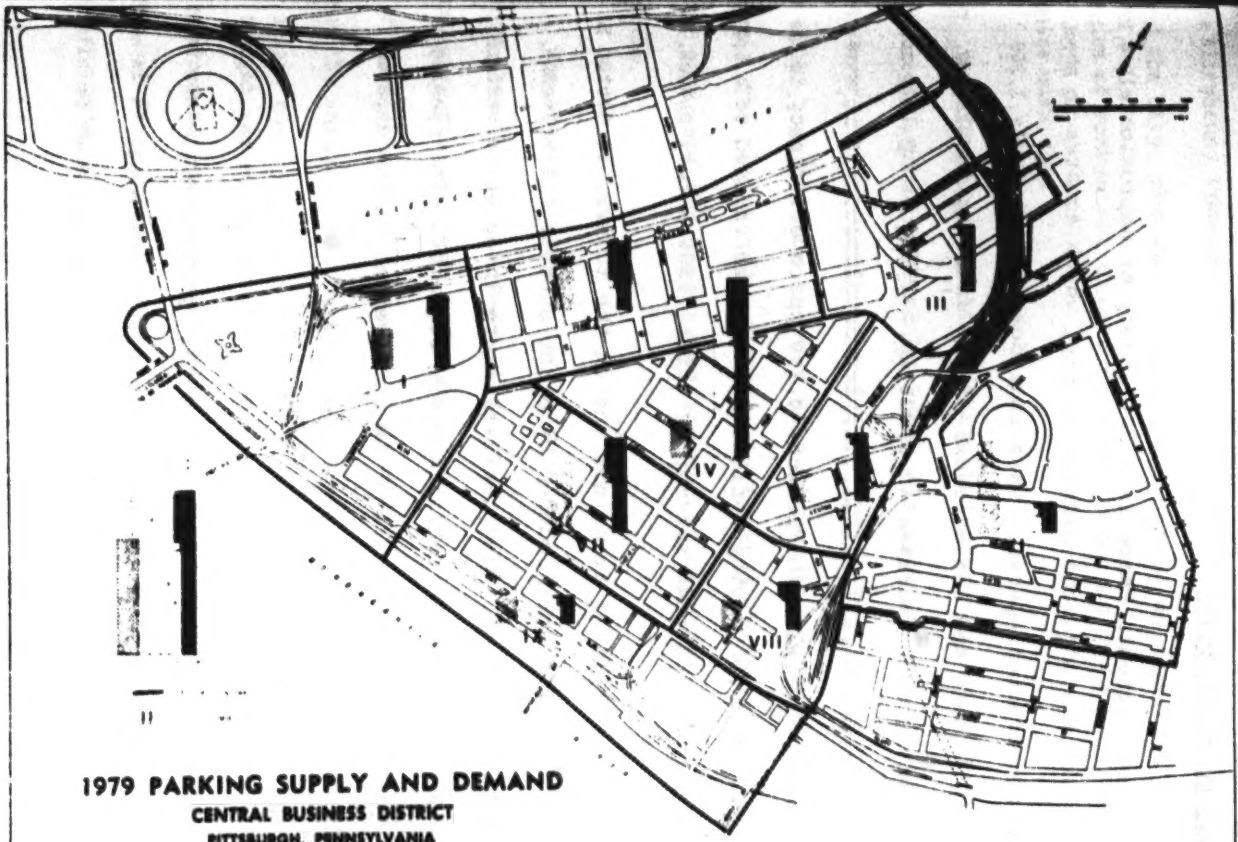
667a

Plaintiffs' Exhibit No. 11

1979 Parking Space Surpluses and Deficiencies

It was assumed that there would be no loss in the existing parking supply except for that displaced by the new and proposed developments. The net effect of the construction of 5,755 spaces and those lost as a result of these developments is estimated to increase the adjust parking supply by about 4,200 spaces (Table 11). The largest increase in supply will be in Sector III where the first phase of Penn Central Park is proposed. It is assumed that the parking supply in the Penn Central Park area will no more than satisfy the needs of that development; those parking in the area now will be displaced.

The largest deficiency, 7,913, is anticipated in the core area, Sector IV, where, to the present deficiency of about 5,400 spaces, are added the effect of construction of the Pittsburgh National Bank, Two Oliver Plaza, Methodist Union, and Bell Telephone Equipment buildings. It is anticipated that the supply will continue to exceed the demand in Sector VI. By 1979, an overall deficiency in the adjusted supply of about 10,500 spaces is anticipated within the present study area. The estimated adjusted supply and demands for 1979 are shown in Figure 14.



1979 PARKING SUPPLY AND DEMAND

CENTRAL BUSINESS DISTRICT

PITTSBURGH, PENNSYLVANIA

1969

Wilbur Smith and Associates

FIGURE 14

Plaintiffs' Exhibit No. 11

669a

Plaintiffs' Exhibit No. 11

Policy Considerations

At present, there is a deficiency of approximately 4,10 spaces in the adjusted parking supply, which equates to about 4,700 constructed spaces. This includes approximately 1,200 walk-in parkers and the over-use of the existing facilities. T deficiency should increase to about 10,500 spaces by 1979 unles unforeseen new parking facilities are developed. If it were decided to live with the present 4,100 space deficiency in the future, the 10,500 space deficiency would be reduced to a 6,40 deficiency in adjusted spaces, or about 7,300 actual spaces.

The critical area, now and in the future, is Sector IV, which is the CBD core bounded by Grant Street, Fifth Avenue, and Liberty Avenue. Many facilities are in adjacent sectors, but additional nearby facilities are required. The opening of the Civic Arena West Lot and the improvement of the unpaved Melody Tent Lot would provide some relief.

A further source of relief may be found in the daytim use of the parking area around the new sports stadium now unde construction north of the Allegheny River. Although it is und stood that a portion of the 4,500 parking spaces must be allo

the Allegheney County Community College in the Manchester
of the city, the use of this space should be explored. The
vision of convenient direct transportation to the CBD would
urage such use.

The Pittsburgh Public Parking Authority has developed
t garages in the central business district, of which, only
Boulevard Garage did not produce a profit for 1968. Taken
whole, however, the garages have proven to be sound financial
ures. The Mellon Square Garage is located in the center of
CBD core, and the others are located in more peripherial
tions.

The acquisition and development of these garages has been
nced through the issuance of revenue bonds, and the provision,
he City of Pittsburgh, of funds from parking meter revenues.
of the garages are leased to, or managed by, private operators
of the garage leases continue to be held by private depart-
stores for operation.

Any new parking facilities must be integrated in the
er plan for development of the Golden Triangle. Their
tion should be carefully planned in relation to routes of

Plaintiffs' Exhibit No. 11

entry into the central area to provide needed parking on the periphery of the study area and, thus, prevent unnecessary congestion of the core area streets.

It is recommended that permanent parking facilities, in addition to those integral with the new and proposed developments now known, be provided within the study area. Fringe parking, along with appropriate linkages, should also be explored.

The expansion of the program will require specific analyses for individual projects taking into consideration overall planning for the CBD, transportation improvements, and new developments.

APPENDICES

Plaintiffs' Exhibit No. 11

Table A-1
PARKING SPACE INVENTORY
1969

BLOCK NUMBER (1)	CURB PARKING: Metered 30-Minute	Metered One Hour	Metered Two Hour	Metered Four Hour	Un-Metered (2)	Total Curb	OFF-STREET PARKING: Private Lots	Private Garages	Public Lots	Public Garages	Total Off-Street	GRAND TOTAL
103	-	-	-	-	-	-	-	-	-	938	938	938
104	-	-	-	-	-	-	-	-	-	450	450	450
105	-	2	-	-	-	2	-	60	75	-	135	137
106	-	-	-	-	-	-	-	-	-	-	-	-
107	-	3	-	-	-	3	-	-	128	-	128	131
108	-	-	-	-	-	-	-	-	35	-	35	35
109	-	7	-	-	-	7	-	-	142	125	267	274
110	6	-	-	-	-	6	-	-	22	-	22	28
111	-	5	-	-	-	5	-	-	215	581	796	801
112	5	-	-	-	-	5	-	-	39	-	39	44
113	4	-	-	-	-	4	225	-	270	-	495	499
114	6	-	-	-	-	6	14	-	50	-	64	70
115	39	-	-	-	-	39	15	-	-	-	15	54
116	-	-	-	12	-	12	-	-	600	-	600	612
117	-	-	-	-	5 (3)	5	-	-	300	-	300	305
201	3	-	-	-	-	3	-	300	-	-	300	303
203	-	-	-	-	-	-	-	-	-	618	618	618
204	5	-	-	-	-	5	-	-	-	-	-	5
205	-	-	-	-	-	-	-	-	-	-	-	-

Plaintiffs' Exhibit No. 11
675a

Table A-1 (Cont'd)

BLOCK NUMBER (1)	CURB PARKING: METERED: 30-Minute	One Hour	Two Hour	Four Hour	Un-Metered (2)	Total Curb	OFF-STREET PARKING: Private: Lots	Garages	Public: Lots	Garages	Total Off-Street	GRAND TOTAL
206	-	-	-	-	-	-	-	-	-	-	-	-
207	20	-	-	-	-	20	-	-	32	-	32	52
208	5	-	-	-	-	5	-	-	-	-	-	5
209	6	-	-	-	-	6	-	-	-	-	-	6
210	-	-	-	-	-	-	-	-	-	1,040	1,040	1,040
211	5	-	-	-	-	5	-	10	-	-	10	15
212	-	12	-	-	-	12	25	55	-	-	80	92
213	-	-	-	-	-	-	-	-	-	-	-	-
214	-	-	-	-	-	-	-	-	-	-	-	-
215	-	-	-	-	-	-	-	-	-	-	-	-
216	8	-	-	-	-	8	—	-	-	-	-	8
501	-	15	-	-	-	15	-	-	-	-	-	15
502	-	-	-	-	-	-	-	-	-	-	-	-
503	-	-	-	-	-	-	-	-	-	-	-	-
505	-	-	-	-	-	-	-	-	-	-	-	-
506	-	-	-	-	-	-	-	150	-	-	150	150
5[illegible]	-	-	-	-	-	-	-	-	94	1,040	1,134	1,134
[illegible]	-	-	-	-	-	-	-	-	-	152	152	152
[illegible]1	3	9	-	-	-	12	-	-	-	-	-	12
[illegible]02	-	-	-	-	-	-	-	-	176	-	176	176

Table A-1 (Cont'd)

BLOCK NUMBER[1]	CURB PARKING: Metered 30-Minute	Metered One Hour	Metered Two Hour	Metered Four Hour	Un-Metered[2]	Total Curb	OFF-STREET PARKING: Private Lots	Private Garages	Public Lots	Public Garages	Total Off-Street	Grand Total
603	-	-	-	-	-	-	-	-	-	2,200	2,200	2,200
604	-	-	-	-	-	-	45	-	-	-	45	45
605	-	-	-	-	-	-	-	-	115	-	115	115
606	-	-	-	-	-	-	-	-	-	-	-	-
607	-	3	-	-	-	3	-	-	-	-	-	3
608	-	-	-	-	-	-	-	10	410	325	745	745
611	-	22	-	-	-	22	48	10	-	-	58	80
612	-	19	-	-	-	19	32	10	80	-	122	141
613	-	-	-	-	-	-	40	-	80	-	120	120
614	-	16	5	-	30	51	25	-	94	-	119	170
615	-	22	4	-	20	46	-	-	-	-	-	46
616	-	17	-	-	-	17	41	-	-	-	41	58
617	-	-	-	-	-	-	100	-	-	-	100	100
618	-	11	-	-	14	25	8	-	-	-	8	33
619	-	15	-	-	-	15	-	-	-	-	-	15
620	-	-	-	11	-	11	-	-	-	-	-	11

Plaintiffs' Exhibit No. 11

677a

Table A-1 (Cont'd)

BLOCK NUMBER(1)	CURB PARKING: Metered 30-Minute	Metered One Hour	Metered Two Hour	Metered Four Hour	Un-Metered(2)	Total Curb	OFF-STREET PARKING: Private Lots	Private Garages	Public Lots	Public Garages	Total Off-Street	GRAND TOTAL
631	-	-	-	-	65	65	30	220	250	-	500	565
636	-	-	-	-	-	-	-	-	2,028	-	2,028	2,028
638	-	-	-	-	-	-	125	-	-	-	125	125
639	-	27	-	-	-	27	-	-	-	-	-	27
640	-	8	-	-	-	8	-	-	50	-	50	58
641	-	15	-	-	-	15	32	-	-	-	32	47
642	-	10	-	-	-	10	-	-	-	175	175	185
643	-	10	-	-	-	10	-	-	-	-	-	10
644	-	-	-	6	-	6	-	-	60	-	60	66
645	-	-	-	-	-	-	-	-	-	-	-	-
646	-	-	-	-	-	-	46	-	90	-	136	136
701	-	-	-	-	-	-	-	-	-	-	-	-
702	-	8	-	-	-	8	-	-	-	-	-	8
703	-	-	-	-	3(4)	3	-	-	-	-	-	3
704	22	-	-	-	-	22	-	-	-	-	-	22
705	7	-	-	-	-	7	-	-	-	-	-	7
706	-	-	-	-	-	-	-	-	-	-	-	-
707	-	-	-	-	-	-	-	-	-	-	-	-
708	-	-	-	-	-	-	-	-	-	-	-	-
709	-	6	-	-	-	6	-	-	-	-	-	6
710	3	-	-	-	-	3	-	-	108	-	108	111
711	-	-	-	-	-	-	-	-	-	867	867	867
712	15	-	-	-	-	15	-	-	106	-	106	121
713	17	-	-	-	-	17	-	-	128	-	128	145
714	8	-	-	-	-	8	-	-	118	-	118	126
715	-	-	-	-	-	-	-	15	-	750	765	765

Table A-1 (Cont'd)

BLOCK NUMBER(1)	CURB PARKING: Metered 30-Minute	One Hour	Two Hour	Four Hour	Un-Metered(2)	Total Curb	OFF-STREET PARKING: Private Lots	Private Garages	Public Lots	Public Garages	Total Off-Street	GRAND TOTAL
716	-	-	-	-	-	-	-	-	225	-	225	225
717	-	-	-	-	-	-	-	-	-	-	-	-
718	-	-	-	-	-	-	-	-	-	140	140	140
719	-	-	-	-	-	-	-	-	163	-	163	163
720	10	-	-	-	-	10	-	-	50	838	888	898
721	-	3	-	-	4(3)	7	7	-	20	-	27	34
722	-	-	-	-	-	-	-	-	128	-	128	128
723	-	-	-	-	-	-	-	-	139	-	139	139
724	-	-	-	-	-	-	-	-	100	250	350	350
725	-	-	-	-	-	-	20	-	30	450	500	500
726	-	-	-	-	-	-	17	-	128	-	145	145
727	-	-	-	-	-	-	18	-	-	-	18	18
728	-	-	-	-	-	-	9	-	50	-	59	59
729	-	-	-	-	-	-	-	-	-	500	500	500
730	-	12	-	-	-	12	6	-	-	-	6	18
731	10	6	-	-	-	16	-	-	105	-	105	121
732	-	3	-	-	-	3	-	-	70	-	70	73
733	-	8	-	-	-	8	22	-	-	-	22	30
734	-	5	-	-	-	5	62	-	52	-	114	119
735	-	10	-	-	-	10	-	-	120	-	120	130
736	-	-	-	-	-	-	30	-	-	-	30	30
737	-	4	-	-	-	4	-	-	-	45	45	49
738	-	-	-	-	-	-	20	-	27	-	47	47
739	-	4	-	-	-	4	4	-	76	-	80	84
740	-	-	-	-	-	-	-	-	-	-	-	-

Table A-1 (Cont'd)

BLOCK NUMBER(1)	CURB PARKING: Metered 30-Minute	Metered One Hour	Metered Two Hour	Metered Four Hour	Un-Metered(2)	Total Curb	OFF-STREET PARKING: Private Lots	Private Garages	Public Lots	Public Garages	Total Off-Street	GRAND TOTAL
741	-	-	-	10	-	10	-	-	113	-	113	123
742	-	-	-	-	-	-	32	-	174	-	206	206
743	-	6	-	-	-	6	35	-	-	-	35	41
744	-	-	-	-	-	-	13	-	35	-	48	48
745	5	-	-	-	10	15	-	-	124	-	124	139
746	-	9	-	-	-	9	15	-	98	-	113	122
747	-	8	-	-	-	8	30	-	200	-	230	238
748	-	-	-	-	-	-	-	-	-	-	-	-
749	-	-	-	-	-	-	-	391	-	741	1,132	1,132
763	-	-	-	-	-	-	-	-	800	-	800	800
TOTAL	221	340	9	39	147	756	1,191	1,231	8,922	12,225	23,569	24,325

(1) Block numbers are shown in Figure A.
(2) Spaces are posted with a one-hour time limit except as indicated.
(3) Indicates curb spaces posted for 30-minute time limit.
(4) Indicates curb spaces posted for 20-minute time limit.

Table A-2

1969 PARKING SUPPLY AND DEMAND

BLOCK NUMBER	AVERAGE DEMAND Short Term(1)	Long Term(1)	Total	ADJUSTED SUPPLY	SURPLUS	DEFICIENCY
103	30	13	43	797	754	-
104	43	11	54	383	329	-
105	108	199	307	124	-	183
106	45	79	124	-	-	124
107	83	57	140	119	-	21
108	114	-	114	31	-	83
109	72	27	99	240	141	-
110	203	155	358	25	-	333
111	21	28	49	692	643	-
112	91	-	91	39	-	52
113	262	67	329	420	91	-
114	47	23	70	63	-	7
115	89	172	261	49	-	212
116	-	-	-	551	551	-
117	10	25	35	274	239	-
201	212	425	637	273	-	364
203	31	40	71	525	454	-
204	763	337	1,100	4	-	1,096
205	217	267	484	-	-	484
206	191	300	491	-	-	491

Plaintiffs' Exhibit No. 11 681a

Table A-2 (Cont'd)

BLOCK NUMBER	AVERAGE DEMAND Short Term(1)	Long Term(1)	Total	ADJUSTED SUPPLY	SURPLUS	DEFICIENCY
207	93	80	173	44	-	129
208	-	90	90	4	-	86
209	177	230	407	5	-	402
210	17	20	37	884	847	-
211	233	806	1,039	14	-	1,025
212	421	783	1,204	84	-	1,120
213	43	336	379	-	-	379
214	195	187	382	-	-	382
215	188	205	393	-	-	393
216	106	286	392	7	-	385
501	115	448	563	14	-	549
502	-	31	31	-	-	31
503	-	-	-	-	-	-
505	-	-	-	-	-	-
506	-	216	216	135	-	81
507	4	-	4	969	965	-
508	110	98	208	123	-	80
601	75	127	202	11	-	191
602	-	-	-	158	158	-
603	123	298	421	1,870	1,449	-
604	196	251	447	41	-	406
605	-	20	20	-	-	20
606	99	83	182	104	-	78
607	-	13	13	3	-	10
[illegible]	[illegible]	195	333	854	521	-

Table A-2 (Cont'd)

BLOCK NUMBER	AVERAGE DEMAND Short Term(1)	Long Term(1)	Total	ADJUSTED SUPPLY	SURPLUS	DEFICIENCY
609	-	-	-	-	-	-
610	-	-	-	-	-	-
611	88	90	178	72	-	106
612	116	11	127	127	-	-
613	-	-	-	108	108	-
614	16	9	25	208	183	-
615	20	16	36	41	5	-
616	31	46	77	52	-	25
617	-	-	-	90	90	-
618	-	20	20	26	6	-
619	-	12	12	14	2	-
620	-	-	-	10	10	-
631	107	199	306	506	200	-
636	78	116	194	1,825	1,631	-
638	40	75	115	113	-	2
639	-	31	31	24	-	7
640	-	-	-	52	52	-
641	21	58	79	43	-	36
642	76	32	108	158	50	-
643	-	25	25	9	-	16

BLOCK NUMBER	AVERAGE DEMAND Short Term(1)	Long Term(1)	Total	ADJUSTED SUPPLY	SURPLUS	DEFICIENCY
644	-	57	57	59	2	-
645	-	25	25	-	-	25
646	-	87	87	122	35	-
701	869	234	1,103	-	-	1,103
702	315	159	474	7	-	467
703	115	14	129	3	-	126
704	96	3	99	20	-	79
705	31	38	69	6	-	63
706	56	95	151	-	-	151
707	942	201	1,143	-	-	1,143
708	126	317	443	-	-	443
709	131	279	410	5	-	405
710	256	172	428	100	-	328
711	-	-	-	737	737	-
712	34	275	309	109	-	200
713	47	301	348	131	-	217
714	25	-	25	113	88	-
715	344	624	968	652	-	316
716	-	-	-	203	203	-
717	-	-	-	-	-	-

Table A-2 (Cont'd)

BLOCK NUMBER	AVERAGE DEMAND Short Term(1)	Long Term(1)	Total	ADJUSTED SUPPLY	SURPLUS	DEFICIENCY
718	27	306	333	119	-	214
719	48	51	99	147	48	-
720	54	15	69	766	697	-
721	196	318	514	30	-	484
722	-	-	-	115	115	-
723	-	-	-	125	125	-
724	268	538	806	303	-	503
725	15	15	30	428	398	-
726	114	-	114	130	16	-
727	14	25	39	16	-	23
728	-	10	10	53	43	-
729	-	-	-	425	425	-
730	41	187	228	16	-	212
731	129	158	287	109	-	178
732	-	47	47	66	19	-
733	39	-	39	27	-	12
734	85	22	107	108	1	-
735	18	33	51	117	66	-
736	13	254	267	27	-	240
737	-	10	10	42	32	-

Table A-2 (Cont'd)

BLOCK NUMBER	AVERAGE DEMAND: Short Term(1)	Long Term(1)	Total	ADJUSTED SUPPLY	SURPLUS	DEFICIENCY
738	72	191	263	42	-	221
739	4	-	4	76	72	-
740	34	22	56	-	-	56
741	-	10	10	111	101	-
742	24	24	48	186	138	-
743	8	25	33	37	4	-
744	42	51	93	44	-	49
745	57	251	308	125	-	183
746	-	72	72	111	39	-
747	36	30	66	215	149	-
748	73	-	73	-	-	73
749	644	1,245	1,889	1,019	-	870
763	-	-	-	720	720	-
TOTAL	10,920	14,539	25,459	21,338	13,652	17,773

(1) Short term parkers are those who park less than 5 hours; long term, those who park 5 hours or longer.

Plaintiffs' Exhibit No. 12

PLAINTIFF'S EXHIBIT 1
DATE
THOMAS A. MUSTACHIO
OFFICIAL REPORTER

DONALD M. McNEIL
CONSULTING ENGINEER
1120 INVESTMENT BUILDING
239 FOURTH AVENUE
PITTSBURGH, PENNSYLVANIA 15222

TELEPHONE:
412 391-3650

Resumé of Outline of Training and Experience

1. B. S. in Civil Engineering - University of Pittsburgh, June 1926.

2. Assistant Traffic Engineer, City of Pittsburgh, June 1926 to October 1932.

3. Traffic Engineer, City of Pittsburgh, October 1932 to February 1952.

4. Consulting Engineer - Specializing in traffic, transportation and parking problems, February 1952 to date.

5. Have served and/or presently serving in a Consulting Engineer capacity for the following agencies and communities:

A. Communities

Pennsylvania:

1. Aliquippa
2. Ambridge
3. Avalon
4. Braddock
5. Butler
6. Canonsburg
7. Carlisle
8. Carnegie
9. Charleroi
10. Clarion
11. Connellsville
12. Coraopolis
13. Donora
14. Duquesne
15. East Pittsburgh
16. Erie
17. Franklin
18. Greensburg
19. Hanover
20. Homestead
21. Irvin
22. Johnstown
23. Latrobe
24. Leechburg
25. McCandless Township
26. McKeesport
27. McKees Rocks
28. Monessen
29. Mt. Lebanon
30. New Kensington
31. Oil City
32. Philipsburg
33. St. Marys
34. Sewickley
35. State College
36. Swissvale
37. Tarentum
38. Titusville
39. Turtle Creek
40. Union City
41. Uniontown
42. Vandergrift
43. Warren
44. Washington
45. Wilkinsburg
46. Williamsport
47. York
48. Zelienople

West Virginia:

49. Clarksburg
50. Fairmont
51. Martinsburg
52. Morgantown
53. Spencer
54. Weirton
55. Wheeling

Maryland:

56. Cumberland

Ohio:

57. Conneaut

Plaintiffs' Exhibit No. 12

B. Agencies

1. Department of Highways, Commonwealth of Pennsylvania
2. Pittsburgh Railways Company
3. Western Pennsylvania Bus Association
4. Buchart Engineering Company
5. Yellow Cab Company
6. Joseph Horne Company
7. Gimbel Brothers
8. Pittsburgh Regional Planning Association
9. Public Parking Authority of Pittsburgh
10. John B. Kelly & Associates
11. Oliver-Tyrone Corporation
12. Warner Brothers
13. Calvary Episcopal Church
14. Mt. Alvernia Convent
15. Morrison & Knudsen Company
16. Sears, Roebuck & Company
17. Don-Mark Realty
18. Boron Oil Company
19. Gulf Oil Corporation
20. Allegheny Conference on Community Development
21. Griswold, Winters & Swain, Landscape Planners & Architects
22. Beckman, Swenson & Associates, City Planners
23. Celli-Flynn, Architects-Engineers
24. Altenhof & Bown, Architects
25. Redevelopment Authority of Allegheny County
26. Washington County Industrial Development Agency
27. Redevelopment Authority of the County of Washington
28. Westinghouse Atomic Research
29. Bethel Development Corporation
30. Shadyside Hospital
31. Atlantic Refining Company
32. Western Pennsylvania National Bank
33. Pitt-Bethel Association
34. Crafton-Ingram Shopping Center
35. Hellmuth, Obata & Kassabaum (Architects)
36. Simonds & Simonds (Landscape Architects - Planners)

6. Technical Society's & Professional Organizations

A. Institute of Traffic Engineers - National President 1953-1954.

B. American Society of Civil Engineers - Fellow.

C. Registered Professional Engineer of Pennsylvania - Past President, Pittsburgh Chapter of Pennsylvania Society of Professional Engineers.

D. National Municipal Signal Association.

E. Member of the Parking Committee of the Highway Research Board.

F. International Municipal Parking Congress.

7. Others

A. Member of the Better Traffic Committee of Pittsburgh - Chairman 1961-1969.

B. Served for both the National Safety Council and the American Automobile Association to judge national yearly contests on traffic safety.

Donald M. McNeil was born January 17, 1905. During the summers of 1921 and 1922, just prior to and following his graduation from high school, he was employed by the Penn-Pitt Construction Company of Pittsburgh on highway construction work. From June 1921 to February 1925 he was employed by the W. K. Reed Construction Company, Waynesburg, Pennsylvania, on highway construction work. He graduated from the University of Pittsburgh in June 1926 with the degree of Bachelor of Science in Civil Engineering. At that time he received the honor award of the 1926 Class in the Civil Engineering Department, consisting of a Junior Membership in the American Society of Civil Engineers.

He was immediately employed by the Bureau of Traffic Planning of the City of Pittsburgh as Assistant Traffic Engineer and in 1932 took over the duties of Traffic Engineer, which position he held until February 1, 1952, following which he entered private consulting engineering work, specializing in traffic engineering, transportation and parking problems.

From 1945 until his resignation from the City of Pittsburgh, he was permitted to engage in outside consultant work. During this period the following consultant work was performed for Chambers of Commerce, brokerage firms, municipalities and planning associations:

1. Parking surveys of the following business districts

   Uniontown, Pennsylvania
   Fairmont, West Virginia
   Sewickley, Pennsylvania
   McKeesport, Pennsylvania
   New Kensington, Pennsylvania
   Pittsburgh, Pennsylvania

2. Traffic relief study of the Point Park Area of the City of Pittsburgh for the Pittsburgh Regional Planning Association

3. Development of future traffic volumes on the proposed Penn-Lincoln Parkway-West, and six of its intersections, for the Pennsylvania State Highway Department

4. Development of the future traffic volumes which would use proposed Brady Street and 10th Street Bridge connections to the Penn-Lincoln Parkway-East, for the Pennsylvania State Highway Department

5. Various minor traffic engineering consultant work for the Cities of Wheeling, West Virginia, and Monessen, Pennsylvania

In June 1950 he temporarily discontinued all outside consultant work and accepted the position of Consultant and Acting Coordinator for the Public Parking Authority of Pittsburgh, Pennsylvania.

Since resigning his office of Traffic Engineer of the City of Pittsburgh, February 1, 1952, he has been engaged on the following work:

Retained by the following bus companies for consulting traffic engineering services:

Debolt Transit Company, Homestead, Pennsylvania

Bigi Bus Lines, Bridgeville, Pennsylvania

Oriole Motor Coach Company, Greentree, Pennsylvania

Shafer Coach Lines, Coraopolis, Pennsylvania

Engaged by the Western Pennsylvania Traffic Association, a group of 22 independent bus companies, to formulate plans regarding the routing and loading of buses in downtown Pittsburgh

Engaged by Joseph Horne Company, the second largest retail store in Pittsburgh, to advise and collaborate on traffic problems relating to their operations which have arisen as a result of the major highway improvement program in Pittsburgh

Engaged by the Pittsburgh, Wilkinsburg, New Kensington, McKeesport and Sewickley Parking Authorities to serve as traffic consultant on their off-street parking program

Engaged by the A. E. Masten Company, brokerage bankers, to prepare a parking study of the downtown business section of Wheeling, West Virginia

Engaged by the Pittsburgh Railways Company as a consultant on various accident problems

Engaged by the Grant-Oliver Corporation to advise and collaborate on operations of their off-street parking facilities in the City of Pittsburgh

Engaged for the making of comprehensive parking surveys of the following business areas:

Butler, Pennsylvania—
for the Butler Parking Authority

Homestead, Pennsylvania—
for the Borough of Homestead

Connellsville, Pennsylvania—
for the Connellsville Parking Authority

Mt. Lebanon, Pennsylvania—
for the Borough of Mt. Lebanon

Erie, Pennsylvania—
for the Erie Parking Authority

Plaintiffs' Exhibit No. 12

690a Plaintiffs' Exhibit No. 12

Introducing



Donald M. McNeil

Wilkinsburg, Pennsylvania—
for the Wilkinsburg Parking Authority

Engaged by the Pittsburgh Regional Planning Association as Consultant to their Technical Staff for the conducting of a survey and the formulation and recommendation of a program for the solution of the parking problem in the North Side Business Section of Pittsburgh

Engaged by Morrison & Knudsen to make a financial analysis of the proposed Mellon Square Garage in Pittsburgh

He is married; has two married children; resides at No. 5 Colonial Place, Pittsburgh 32, Pennsylvania. He is a Member of the American Society of Civil Engineers; President of the Institute of Traffic Engineers (1953-54); and a Registered Professional Engineer. In addition, he serves as a member of the Better Traffic Committee of Pittsburgh, a citizens group which acts in an advisory capacity to the Administration on all traffic problems.

He has served for both the National Safety Council and American Automobile Association to judge national yearly contests on traffic safety.

Donald M. McNeil
Consultant Traffic Engineer
706 Benedum Trees Building
223 Fourth Avenue
Pittsburgh 22, Pennsylvania

Specializing in Traffic Engineering, Transportation and Parking Problems

Defendant's Exhibit H

691a

BUREAU OF TRAFFIC PLANNING

OLDEN TRIANGLE CORDON COUNT 1963



CITY OF PITTSBURGH

BUREAU OF TRAFFIC PLANNING

DEPARTMENT OF PUBLIC SAFET

Defendant's Exhibit H

BUREAU OF TRAFFIC PLANNING

TABLE OF CONTENTS

		Page
Introduction		1
Objectives		1
Count Organization		1
Data Collection		1
Data Reliability		2
General Traffic Conditions		3
General Analysis		3
Summary		6
Appendix	Following Page	7

LIST OF FIGURES

Figure	Title	following Page
1	Locations of Traffic Count Stations	3
2	All Vehicles Entering and Leaving C.B.D. by Hour	4
3	Major Traffic Routes Into and Out of C.B.D	5
4	Percent of Total Traffic Entering and Leaving C.B.D.	5
5	Percent of People Entering and Leaving C.B.D.	5
6	Vehicle Accumulation Within C.B.D	5
7	Accumulation of People Within C.B.D.	5
8	Comparison of Vehicle Accumulation Within C.B.D. 1955 and 1963	

Defendant's Exhibit H

LIST OF TABLES-APPENDIX

Tables of 1963 Data

Table	Descriptive Title
I	Total Traffic Entering and Leaving C.B.D.
II	Total Persons Entering and Leaving C.B.D. by Various Modes of Transportation
III	All Vehicular Traffic Entering and Leaving C.B.D. by Station and Time
IV	Hourly Totals of Inbound and Outbound Passenger Cars and Occupants by Time of Day and Station
V	Hourly Totals of Inbound and Outbound Trucks and Occupants by Time of Day and Station
VI	Hourly Totals of Inbound and Outbound Transit Vehicles and Occupants by Time of Day and Station
VII	Pedestrian and Over-all Data Summary
VIII	Summary of Passenger Cars and Trucks With Passenger Load Factors by Hour by Direction
IX	Summary of Passenger Cars and Trucks With Passenger Load Factors by Station by Direction (2 pages)
X	Mass Transit Vehicle and Passenger Summary with Load Factors by Hour by Direction by Station (2 pages)
XI	C.B.D. Accumulation by Type of Vehicle
XII	Accumulation of People Within C.B.D. by Mode of Transportation
XIII	Pedestrians Engering and Leaving C.B.D. by Station and Time

Tables of 1955 Data

A Passenger Vehicle and Passenger Summary Entering and Leaving C.B.D.

B Truck and Passenger Summary Entering and Leaving C.B.D.

C Bus and Passenger Summary Entering and Leaving C.B.D.

D Streetcar and Passenger Summary Entering and Leaving C.B.D.

GOLDEN TRIANGLE

CORDON COUNT

May 8, 1963

INTRODUCTION

Traffic changes continually take place within any urban area. In order to properly evaluate the scope and direction of these changes, and to measure their impact on the Golden Triangle, Pittsburgh's Central Business District, the Bureau of Traffic Planning conducts comprehensive counts of all traffic entering and leaving the C.B.D. between the hours of 7 AM and 6 PM on a typical midweek day. These comprehensive cordon counts are usually conducted at five year intervals and have a history dating to the 1920's. The most recent of these counts was made on May 8, 1963.

OBJECTIVES

The broad objective of this program is to gather data to analyze existing traffic patterns and mass movement of people entering and leaving the Central Business District and relate to historical patterns in order to provide subsequent planning. From these studies the Bureau expects to find areas for improvements on existing major streets, where an economical return in terms of street capacity and quality of operation will result.

COUNT ORGANIZATION-1963

The Bureau utilized the services of approximately 500 high school students under the direct supervision of Bureau of Traffic Planning, Pittsburgh Area Transportation Study, and State Traffic Engineering personnel.

Counts were made between the hours of 7 AM and 6 PM at all 30 stations where traffic enters and leaves the Golden Triangle. These count stations are shown on Figure I. Machine data tabulations were performed by the Pittsburgh Area Transportation Study staff, and data analyses were undertaken by the Bureau of Traffic Planning.

DATA COLLECTION

The following data were collected by direction and by time of day in fifteen (15) minute increments at 29 stations:

1. Number of automobiles and occupants in each.
2. Number of trucks by type (light, medium, and heavy) and the number of occupants in each.

3. Number of unscheduled, special or school buses.
4. Pedestrians.

At Station 30 automatic counters recorded traffic volumes and no manual counts were necessary. (This station was located on a temporary wooden ramp connection from Fort Duquesne Boulevard to the Manchester Bridge. This ramp, which was removed shortly after the study was completed, had been restricted to outbound passenger vehicles only.) Passenger loads were estimated to be the same past Station 30 as those at Station 16, past which all other Manchester Bridge oriented traffic must pass.

In addition to counts taken by students at the above stations, all transit companies regularly serving Downtown Pittsburgh provided this Bureau the following data for the day of the count:

1. Number of buses and their passenger loads crossing the cordon between 7 AM and 6 PM by hour (or by smaller time increments).

2. The routes their transit vehicles follow when entering and leaving the cordoned area.

Railroads with terminals in the Triangle supplied this Bureau with passenger train schedules and the number of people entering and leaving the study area by hour of train arrival and departure on the day, and between the hours of the count.

In order to obtain proper estimates of vehicles and people within the cordoned area at the beginning of the count, parking lot and garage operators reported on pre-addressed stamped cards all vehicles in their facilities at 7 AM on the day of the count. This was supplemented by on-street manual counts of people and moving vehicles prior to the 7 AM starting time.

DATA RELIABILITY

The count day was carefully selected to insure normal midweek conditions. The data collected and displayed herein can be considered extremely reliable and representative of a typical midweek day. Reliability was checked through the use of automatic traffic counters placed at selected locations near manual count stations and by constant checks of student counters by crew supervisors.

This report is presented as a summary and graphic description of the data gathered. A more complete tabulation is presented in the Appendix.

GENERAL TRAFFIC CONDITIONS

A total of 106,795 vehicles were recorded entering and 103,402 leaving the Golden Triangle during the 1963 study period. Traffic has been found to increase in the C.B.D. approximately 3% over 1955 figures, and 8% over the 1953 count. This increase has been in passenger cars since the truck count showed a drop of approximately 15% since 1955, and transit vehicle trips fell 23% during the same 8-year period. Some of the factors which contributed to these changes are:

1. Completion of the Penn-Lincoln Parkway through the Central Business District has reduced thru East-West traffic, particularly trucks, on city streets.

2. The continued redevelopment of the Triangle and the erection of new traffic generators, along with construction of multi-level parking facilities has increased the traffic generating potential for private vehicles.

3. Because of urban sprawl in the Pittsburgh metropolitan area and the inflexibility of the formerly operating transit facilities (inflexibility due to legal, jurisdictional, and other controls), many newly developed residential areas could not be adequately served by mass transit. As a result automobile usage expanded.

4. The extension of the Penn-Lincoln Parkway East and West provided excellent access to the Golden Triangle from these newly developed residential areas which were seriously lacking in mass transit facilities.

GENERAL ANALYSIS

As previously indicated, Figure 1 locates the traffic count stations forming a cordon around the Golden Triangle. Except for the necessary revisions in count locations due to expressway construction, station locations are similar to those used during previous cordon counts.

The locations for counts in 1963 are shown on Page 4.

698a

Defendant's Exhibit H

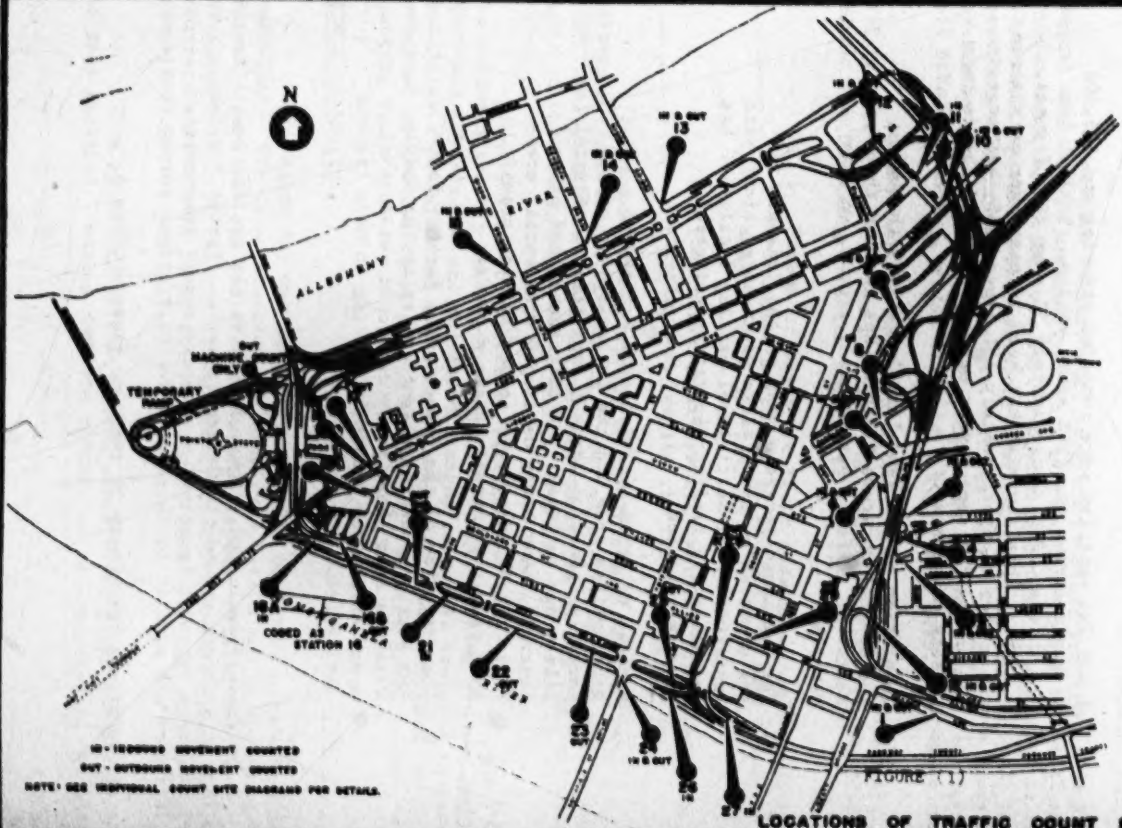
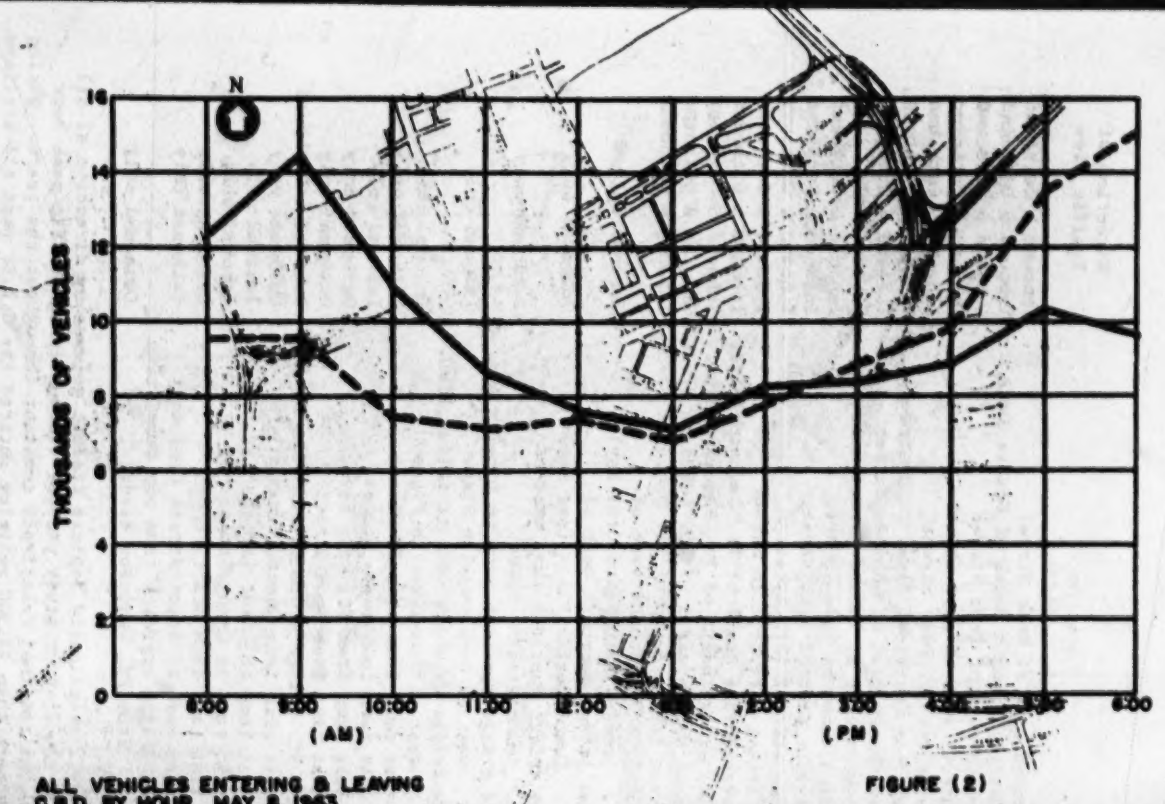


FIGURE (1)

LOCATIONS OF TRAFFIC COUNT STATIONS
CENTRAL BUSINESS DISTRICT CORDON COUNT
MAY 1962

Location	Direction of Traffic Flow
Second Avenue east of Ross Street	Inbound & Outbound
Liberty Bridge approach south of Forbes Ave.	Inbound & Outbound
Forbes Avenue west of Boyd Street	Inbound & Outbound
Diamond Street west of Boyd Street	Inbound & Outbound
Fifth Avenue west of Boyd Street	Inbound & Outbound
Temp. ramp from Crosstown Blvd. to Centre Ave.	Inbound & Outbound
New Centre Avenue east of Chatham Street	Inbound & Outbound
Bigelow Square east of Tunnel Street (one way)	Inbound only
Bigelow Blvd. east of Seventh Ave.	Inbound & Outbound
Liberty Avenue east of 12th Street	Inbound & Outbound
Penn Avenue east of 12th Street	Inbound & Outbound
Smallman Street east of 12th Street	Inbound & Outbound
Ninth Street Bridge north of Ft. Duquesne Blvd.	Inbound & Outbound
Seventh St. Bridge north of Ft. Duquesne Blvd.	Inbound & Outbound
Sixth Street Bridge north of Ft. Duquesne Blvd.	Inbound & Outbound
Sixth Street Bridge north of Ft. Duquesne Blvd.	Inbound & Outbound
A Manchester Bridge approach west of Commonwealth Place (one way)	Inbound only
B Manchester Bridge approach west of Commonwealth Place (one way)	Outbound only
Fort Pitt Bridge approach ramp west of Commonwealth Place	Outbound only
Fort Pitt Bridge approach ramp to Liberty Ave. west of Commonwealth Place	Inbound only
Fort Pitt Bridge approach ramp to Allies Blvd. west of Commonwealth Place	Inbound only
Parkway West ramp from Stanwix Street	Outbound only
Parkway East ramp to Stanwix Street	Inbound only
Parkway East ramp from Ft. Pitt Blvd.	Outbound only
Parkway East ramp from Wood Street	Outbound only
Smithfield St. Bridge south of Ft. Pitt Blvd.	Inbound & Outbound
Parkway West ramp from Grant Street	Outbound only
Parkway West ramp to Grant Street	Inbound only
Parkway East ramp to Grant Street	Inbound only
Parkway East ramp from Grant Street	Outbound only
Blvd. Allies east of Grant Street (one way)	Outbound only
Manchester Bridge approach (one way temp. ramp from Ft. Duquesne Blvd.)	Outbound only

Figure 2 graphically depicts traffic volumes by direction at all ...tions during the 11-hour study period. The entering traffic peak hour ...AM to 9 AM) has remained relatively constant throughout the years. During ...s peak hour more than 14,500 vehicles entered the C.B.D. past all stations. ...er 9 am entering volumes decreased sharply to a low of about 7000 vehicles ... PM. The rise in entering traffic after 1 PM reflects the increase in ... retail activity. This inbound volume drops off again after reaching



ALL VEHICLES ENTERING & LEAVING
C.B.D. BY HOUR MAY 8, 1963
—— INBOUND
– – OUTBOUND

FIGURE (2)

DOWNTOWN — PITTSBURGH

BUREAU OF TRAFFIC PLANNING — DEPARTMENT OF PUBLIC SAFETY

low peak of slightly more than 10,280 vehicles about 5 PM. Later figures and tables in the Appendix will describe the modal split in volumes by direction through the study hours.

From this figure one can see that the counter peak directional volumes follow the same peaking characteristics observed for the peak direction during morning and evening rush hours. This is caused in part by non-expressway traffic which must pass through the Golden Triangle on their way to places of employment and residence outside the study area. An increase in inbound mass transit vehicles is also observed between the hours of 4 PM and 5 PM. This is due in part to the need for additional buses and streetcars to be available in the central area to accommodate the heavy outbound rider flow during the PM peak period.

Figure 3 schematically shows the streets in the central area which carry the heaviest traffic volumes. Only those streets carrying in excess of 300 transit vehicles and/or 5000 cars and trucks by direction during the study period were included. Except for the connections to and from the Penn-Lincoln Parkway East and West, major C.B.D. access points have not changed appreciably since 1955.

Figures 4 and 5 show the relationships between entering and leaving vehicles and the people they carry by general direction. The directional imbalance in flows which exists in the southeast third of the Triangle appears to be the result of changes in entering and leaving travel patterns as well as locations of count stations. Furthermore, since the count was of necessity limited to an 11-hour period and not an entire day, such inbalance can occur.

Accumulations of vehicles and people within the Central Area are of major significance since they represent the total mass of traffic using the streets, parking, and other facilities at any given time.

Figure 6 provides a description of C.B.D. vehicle accumulations. Additional data are provided in the Appendix to this report.

Of significant note is the large number of passenger cars compared to transit vehicles accumulating in the C.B.D. While transit vehicles (buses and streetcars) make only a minor contribution to the total vehicle accumulation, the majority of people accumulating in this area use this mode of transportation. See Figure 7. Without mass transit in Pittsburgh it is unlikely that the Central Area could absorb all the people wishing to work and shop here.

An examination of passenger carload ratios reveals that in 1953 the average carload was 1.66 persons; by 1955, this decreased to 1.61, and in 1963 the load factor was found to be 1.55. At the same time load ratios for transit has remained relatively constant. As mass transit ridership declined, buses and streetcars were removed from service.

Defendant's Exhibit H

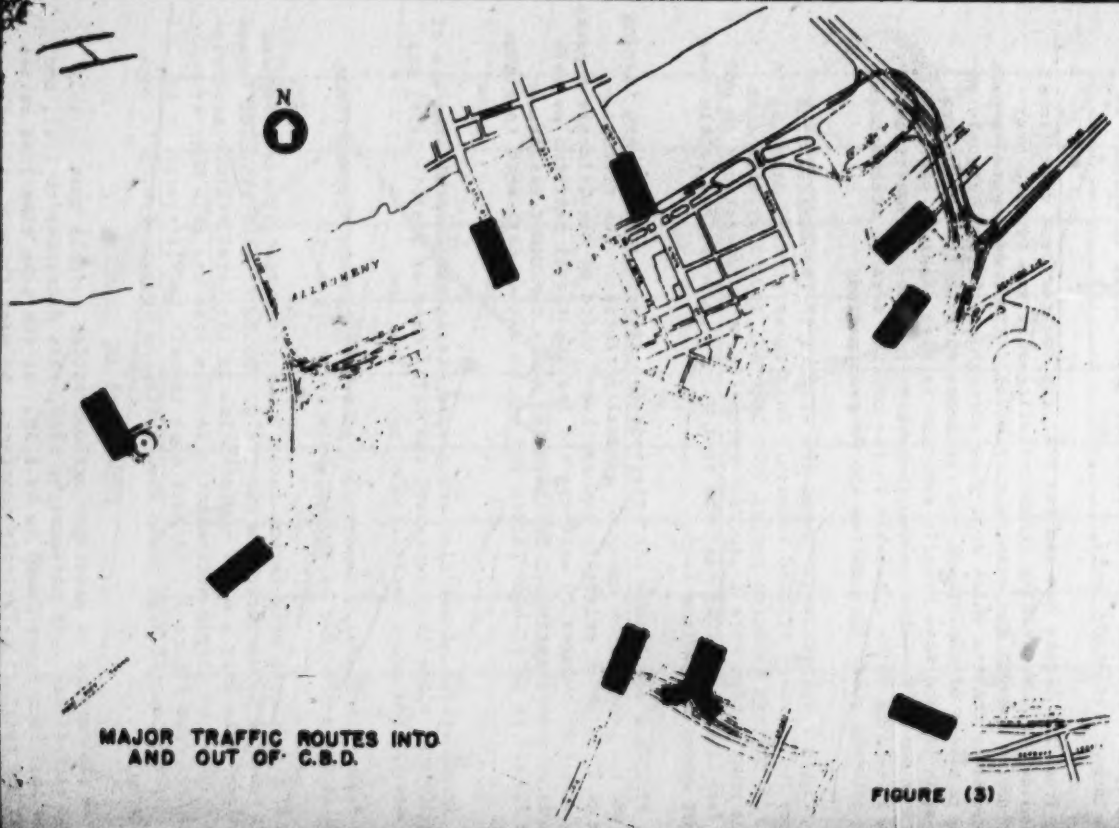
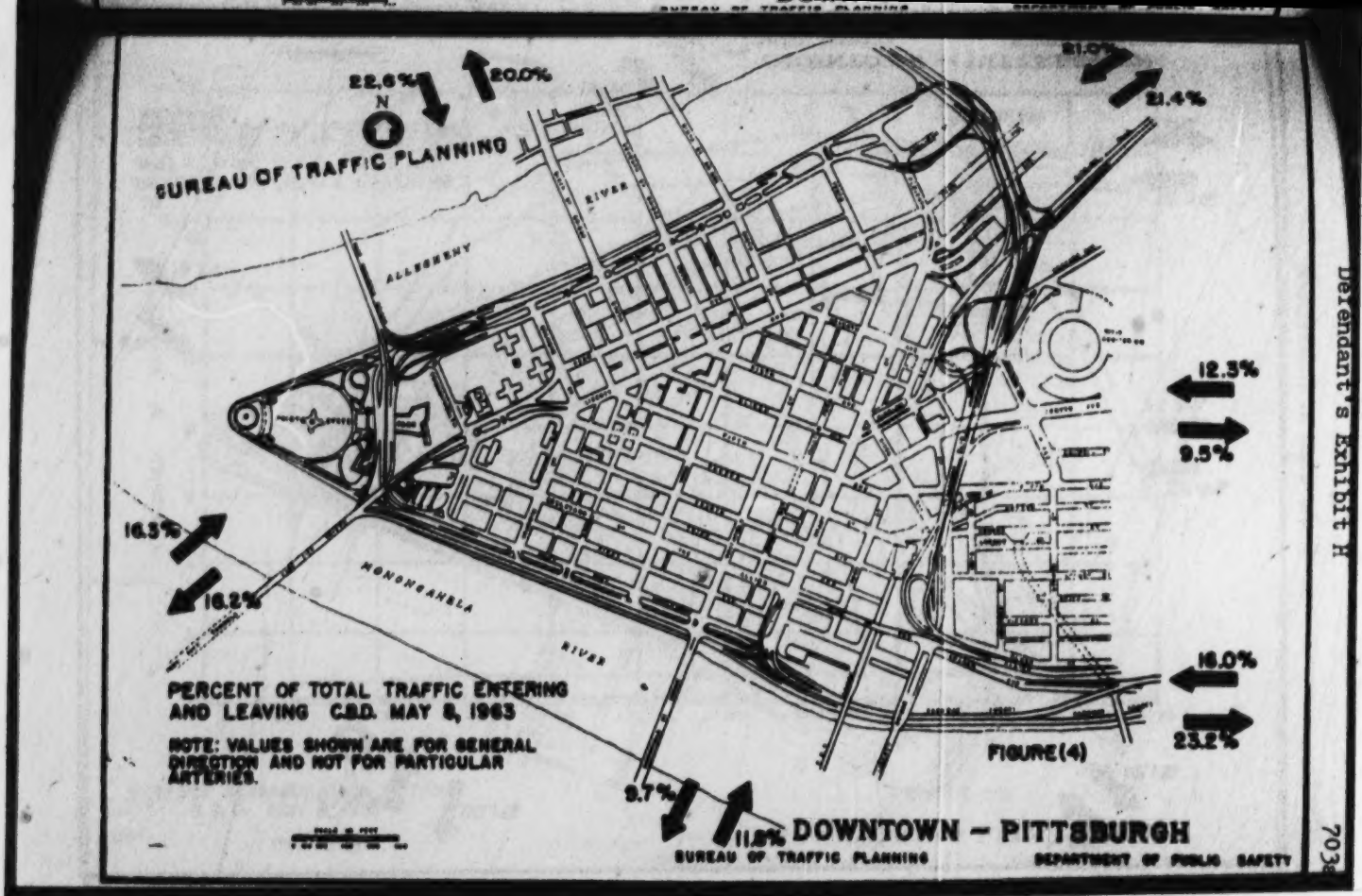
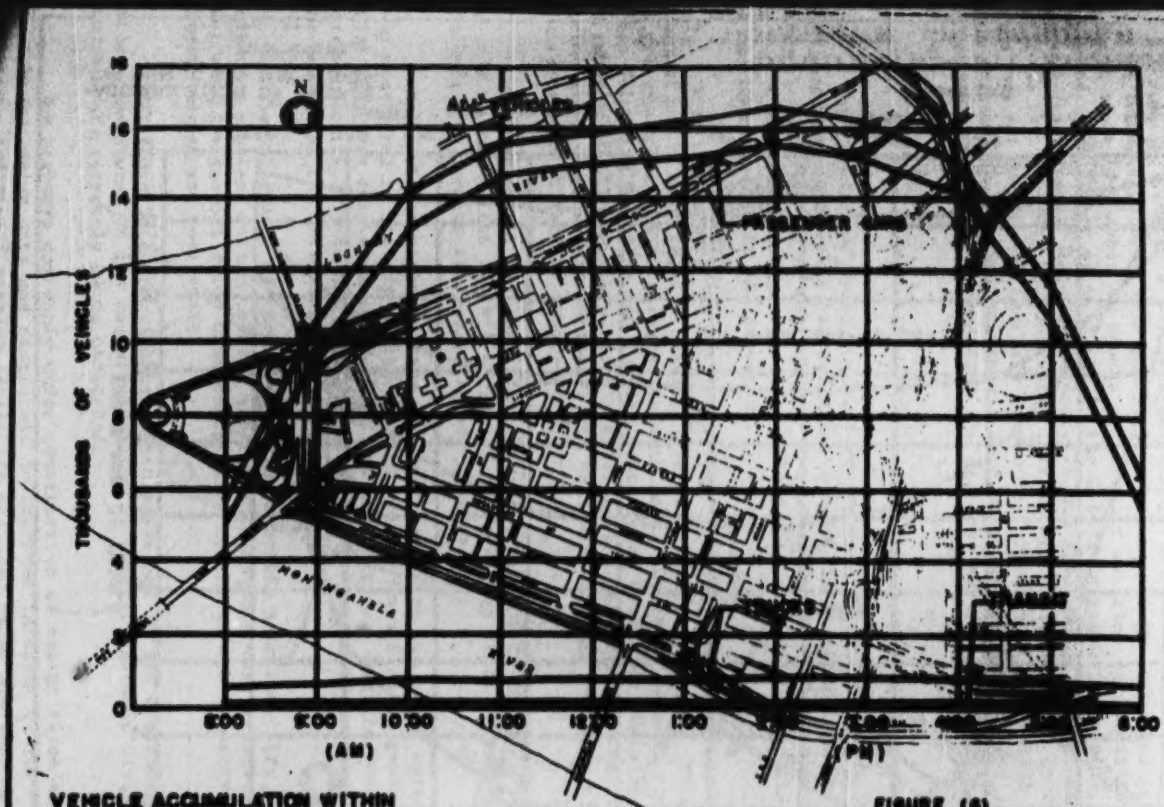


FIGURE (3)



Defendant's Exhibit H

Defendant's Exhibit H



VEHICLE ACCUMULATION WITHIN C.B.D. MAY 8, 1963

FIGURE (6)

DOWNTOWN – PITTSBURGH

BUREAU OF TRAFFIC PLANNING — DEPARTMENT OF PUBLIC SAFETY

Defendant's Exhibit H

705a

33

Defendant's Exhibit H

Finally, in Figure 8 we see the change in vehicle accumulation within the Triangle between 1955 and 1963. This is due to increased passenger car usage, since the number of trucks and transit vehicles decreased during this period. The number of vehicles in the Golden Triangle (even with the major east-west Parkway Interstate Route 76 now affording a bypass for part of the thru traffic) is constantly increasing. This increase in traffic volumes does not reflect an increase in people. Between 1953 and 1955 total people entering and leaving the Central Area decreased at the rate of about 1% per year. Between 1955 and 1963 the decrease was slightly over 1.5% per year.

SUMMARY:

The 1963 Cordon Count revealed an increase in total vehicle traffic entering and leaving the Triangle, even while the Penn-Lincoln Parkway (I-76) served as an east-west thru traffic bypass. This increase had been in private passenger vehicles while the total number of trucks and mass transit vehicles had decreased.

With the increase in total vehicles into the Downtown area, the numbers of people entering and leaving have continued to decline. This may be witnessed in lower passenger to auto loads and fewer transit rider trips. Volumes of entering and leaving pedestrians have also diminished. The reduction in the numbers of people entering and leaving this area in the last eight years is 12% against a net vehicular traffic increase of a little more than 3% for the same period.

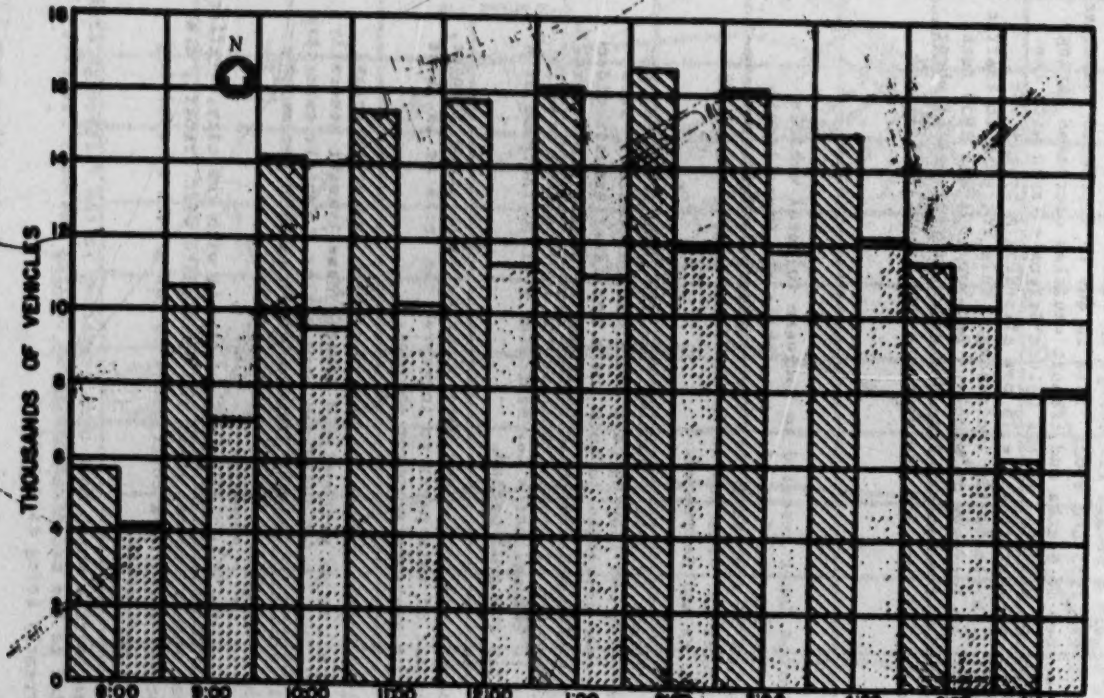
Various causes and conditions have contributed to these changes, but it is not the intent of this paper to interpret the facts as to cause or effect; yet, certain statements appear obvious.

Metropolitan highways have not kept pace with the urban sprawl being experienced in all major metropolitan areas. Mass transit generally failed to satisfy trip demands of these new communities. Vehicle ownership increased most rapidly in the suburbs. The two-car household became the norm rather than the exception.

The inadequacy of highways linking suburbia with the city, traffic circulation problems within central areas and inadequate mass transit, are but a few of the factors which have contributed to the growth of outlying shopping centers and work areas.

All these factors which have been prevalent in the Pittsburgh area and have contributed to the decentralization of Central Business District functions, are currently being corrected.

New highways currently under construction or design allow easy access to the center city and contribute to improved internal C.B.D. circulation. Additional parking facilities are also being provided and



COMPARISON OF VEHICLE ACCUMULATION
WITHIN C.B.D. 1956 & 1963
NOTE: STORES OPEN TILL 9.00 PM DURING 1956
COUNT NO EVENING SHOPPING DURING 1963 COUNT

FIGURE (8)

DOWNTOWN PITTSBURGH
BUREAU OF TRAFFIC PLANNING
DEPARTMENT OF PUBLIC SAFETY

...e Allegheny County Port Authority Transit Division is making significant ...rovements in levels and quality of service which are destined to increase ...nsit usage. Finally, major apartment house construction and civic center ...velopment which are being completed within the environs of the Triangle ...ll increase pedestrian and vehicular activity in this area.

The sum of these factors should reflect significant traffic changes ... the Golden Triangle within the next 5-year period.

******

Defendant's Exhibit H

APPENDIX

TOTAL TRAFFIC ENTERING AND LEAVING C.B.D.
Wednesday, May 8, 1963
8 am to 6 PM

TABLE I

Sta. No.	LOCATION	ALL TRAFFIC			MASS TRANSIT VEHICLES			PRIVATE VEHICLES			TRUCKS		
		IN	OUT	TOTAL	IN	OUT	TOTAL	IN	OUT	TOTAL	IN	OUT	TOTAL
1.	Second Avenue	5,588	4,280	9,868	385	320	705	4,756	3,565	8,321	832	815	1,647
2.	Liberty Bridge approach	7,489	3,863	11,352	306	114	420	6,843	3,269	10,112	646	594	1,240
3.	Forbes Street	3,601	1,842	5,443	211	101	312	3,011	1,362	4,373	390	280	670
4.	Diamond Street	1,261	340	1,601	---	---	---	1,143	308	1,451	118	32	150
5.	Fifth Avenue	3,292	4,032	7,324	206	175	381	2,895	3,370	6,165	397	662	1,043
6.	Crosstown Ramp	3,044	4,795	7,839	---	---	---	2,735	4,313	7,048	309	482	791
7.	Centre-Wylie	3,337	3,440	6,777	126	126	252	3,015	3,042	6,057	322	398	720
8.	Bedford Avenue	1,132	---	1,132	---	---	---	931	---	931	181	---	181
9.	Bigelow Boulevard	7,391	7,659	15,050	91	127	218	6,742	7,005	13,747	649	634	1,303
10.	Liberty Avenue	4,978	8,401	13,379	27	226	253	3,739	6,687	10,226	2,239	1,914	3,153
11.	Penn Avenue	6,118	---	6,118	234	---	234	4,889	---	4,889	1,229	---	1,229
12.	Smallman Street	3,189	3,783	6,972	---	---	---	2,154	2,811	4,965	1,035	972	1,939
13.	Ninth Street Bridge	5,597	5,797	11,394	191	17	208	4,933	5,032	9,965	664	765	1,429
14.	Seventh Street Bridge	4,065	3,795	7,860	245	262	507	3,671	3,405	7,076	394	390	784
15.	Sixth Street Bridge	5,825	4,909	10,734	254	452	706	5,183	4,421	9,604	642	488	1,130
16.	Commonwealth & Ft. Pitt Boulevard	7,761	4,725	12,486	---	---	---	6,424	4,078	10,502	1,337	647	1,984
17.	Liberty Ave. Ramp to Manchester Bridge	---	8,343	8,343	---	574	574	---	7,383	7,383	---	1,162	1,162
18.	Ft. Pitt Br. OFF Ramp at Liberty	7,438	---	7,438	391	---	391	6,648	---	6,648	790	---	793
19.	Ft. Pitt Br. OFF Ramp to Commonwealth Pl.	4,374	---	4,374	196	---	196	3,888	---	3,888	484	---	486
20.	Stanwix to Ft. Pitt Blvd. (Outbound)	---	3,615	3,615	---	17	17	---	3,343	3,343	---	272	272
21.	Parkway Ramp at Stanwix (Inbound)	2,744	---	2,744	---	---	---	2,370	---	2,370	174	---	174
22.	Wood St. & Fort Pitt Boulevard (Outbound)	---	7,025	7,025	---	---	---	---	6,014	6,014	---	1,011	1,011
23.	Wood St. & Parkway (Outbound)	---	2,132	2,132	---	---	---	---	1,973	1,973	---	159	159
24.	Smithfield Bridge	4,709	3,303	8,012	553	464	1,017	3,986	2,720	6,706	723	583	1,306
25.	Grant St. to Parkway West (Outbound)	---	4,360	4,360	---	---	---	---	3,735	3,735	---	625	625
26.	Parkway West to Grant (Inbound)	3,003	---	3,003	---	---	---	3,388	---	3,388	617	---	617
27.	Parkway East to Grant (Inbound)	3,093	---	3,093	12	---	12	4,630	---	4,630	443	---	443
28.	Grant St. to Parkway East (Outbound)	---	3,214	3,214	---	206	206	---	4,664	4,664	---	550	550
29.	Blvd. of Allies to Liberty Bridge	---	2,669	2,669	---	249	249	---	2,518	2,518	---	151	151
30.	Wooden Ramp to Manchester Bridge	---	1,104	1,104	---	---	---	---	1,104	1,104	---	---	---
	Total 1963	103,031	99,628	202,659	3,428	3,430	6,858	89,214	86,122	175,336	13,816	13,383	27,401
	Total 1933	104,913	98,376	203,289	4,691	4,319	8,910	83,973	78,077	162,048	16,250	16,080	32,330
	Difference	+1,882	+1,252	-630	-1,261	-789	-2,052	+5,241	+8,045	+13,287	-2,434	-2,695	-4,929

Defendant's Exhibit H

TOTAL PERSONS ENTERING AND LEAVING C.B.D.
BY VARIOUS MODES OF TRANSPORTATION
Wednesday, May 8, 1963
8 am to 6 PM

TABLE II

Sta. No.	Location	Mass Transit Passengers	Private Vehicle Passengers	Mass Transit Vehicles	Private Vehicles	Pedestrians	Trains	Total Passengers
1.	Second Avenue	17,338	12,932	705	8,321	709		30,270
2.	Liberty Bridge -Approach	9,001	16,289	420	10,112	---		25,290
3.	Forbes Street	8,320	7,016	312	4,573	3,270		15,336
4.	Diamond Street	---	2,228	---	1,431	1,476		2,228
5.	Fifth Avenue	14,341	9,404	381	6,265	4,277		23,743
6.	Crosstown Ramp	---	10,347	---	7,048	---		10,347
7.	Centre-Wylie	6,708	10,082	252	6,057	2,990		16,790
8.	Bedford Avenue	---	1,392	---	951	4,208		1,392
9.	Bigelow Boulevard	4,336	20,883	218	13,747	---		25,219
10.	Liberty Avenue	6,827	15,431	253	10,226	104		22,258
11.	Penn Avenue	6,135	7,439	234	4,889	2,163		13,614
12.	Smallman Street	---	7,061	---	4,965	---		7,061
13.	Ninth Street Bridge	4,113	14,921	208	9,965	1,527		19,034
14.	Seventh Street Bridge	9,914	11,065	507	7,076	1,475		20,979
15.	Sixth Street Bridge	17,328	14,814	704	9,604	3,630		32,142
16.	Commonwealth & Fort Pitt Boulevard	---	13,430	---	10,502	---		13,430
17.	Liberty Ave. Ramp to Manchester Bridge	12,030	11,123	574	7,383	---		23,153
18.	Fort Pitt Br. OFF Ramp at Liberty	8,346	10,852	391	6,648	---		19,198
19.	Fort Pitt Br. OFF Ramp to Commonwealth Pl.	3,548	5,941	196	3,888	---		9,489
20.	Stanwix to Fort Pitt Boulevard (Outbound)	247	5,091	17	3,343	---		5,338
21.	Parkway Ramp at Stanwix (Outbound)	---	4,067	---	2,570	---		4,067
22.	Wood St. & Fort Pitt Boulevard (Outbound)	---	8,679	---	6,014	---		8,679
23.	Wood St. & Parkway (Outbound)	---	2,995	---	1,973	---		2,995
24.	Smithfield Street Bridge	28,365	10,041	1,017	6,706	2,339		38,406
25.	Grant St. to Parkway West (Outbound)	---	5,513	---	3,735	---		5,513
26.	Parkway West to Grant (Inbound)	---	6,706	---	4,388	---		6,706
27.	Parkway East to Grant (Inbound)	182	7,649	12	4,650	---		7,831
28.	Grant St. to Parkway East (Outbound)	4,441	7,438	206	4,664	---		11,879
29.	Blvd. of Allies to Liberty Bridge	4,373	3,973	249	2,318	---		8,346
30.	Wooden Ramp to Manchester Bridge	---	1,984	---	1,104	---		1,984
	Total	170,986	266,806	6,858	175,336	30,168		437,792 Veh. Pass.
Trains								
	Pennsylvania Railroad						3,414	
	Baltimore and Ohio Railroad						830	
	Pittsburgh and Lake Erie Railroad						629	
							4,873	4,873 Train Pass
								442,665

TABLE 711

ALL VEHICULAR TRAFFIC ENTERING AND LEAVING
CENTRAL BUSINESS DISTRICT
By Station and Time
7 am to 6 PM
Wednesday
May 8, 1963

INBOUND

Station	AM 7-8	8-9	9-10	10-11	11-12	PM 12-1	1-2	2-3	3-4	4-5	5-6
1.	729	967	582	330	378	339	467	453	523	669	494
2.	839	702	1,007	732	703	694	734	733	686	569	384
3.	283	271	283	396	344	309	390	388	457	432	391
4.	33	122	98	67	97	69	108	109	126	183	132
5.	223	366	267	148	241	285	338	366	378	463	393
6.	444	471	347	225	217	224	238	235	206	206	206
7.	249	241	158	295	267	240	248	302	358	430	320
8.	53	111	88	64	96	108	83	131	126	144	131
9.	781	1,013	863	736	594	503	588	633	606	710	537
10.	326	443	499	300	374	315	430	389	425	532	458
11.	946	963	550	511	442	391	455	468	488	601	351
12.	183	274	229	218	236	226	271	235	298	305	408
13.	743	977	587	472	405	382	382	421	430	538	350
14.	344	711	386	345	337	227	262	294	289	443	448
15.	703	723	611	486	430	461	525	525	549	537	341
16.	798	1,027	737	343	489	308	377	534	701	987	888
17.											
18.	1,006	1,178	934	762	386	511	516	537	575	577	630
19.	641	934	534	299	699	220	275	233	297	333	375
20.											
21.	343	607	422	234	177	184	179	181	143	144	147
22.											
23.											
24.	660	733	500	383	358	309	371	384	403	370	505
25.											
26.	683	823	625	375	328	313	354	368	400	366	383
27.	683	822	633	313	341	326	420	374	356	320	321
28.											
29.											
30.											

OUTBOUND

AM 7-8	8-9	9-10	10-11	11-12	PM 12-1	1-2	2-3	3-4	4-5	5-6
519	389	339	237	348	309	392	481	446	530	638
399	683	213	224	221	190	174	224	377	508	563
206	219	211	131	130	170	221	196	155	141	148
61	49	37	36	20	25	27	30	20	18	17
379	666	482	394	373	338	330	347	252	337	326
287	254	220	240	260	298	318	390	575	861	1,090
448	474	275	243	269	267	319	322	337	325	305
820	697	567	495	521	551	547	745	784	782	1,066
1,030	884	657	742	922	621	671	663	693	741	765
376	381	337	324	233	264	253	293	363	366	604
419	409	246	352	482	434	475	521	693	893	988
481	640	284	260	289	271	319	250	374	580	640
727	662	409	348	431	420	390	411	396	410	612
430	409	353	298	306	287	357	432	427	786	634
696	720	532	533	648	569	657	773	983	1,228	1,793
167	252	202	252	231	248	269	388	408	662	630
386	388	337	502	481	481	606	574	628	990	1,080
222	209	128	136	83	104	106	146	171	380	460
321	333	275	258	254	236	254	281	384	578	571
317	321	292	292	298	273	354	422	306	643	598
312	370	347	323	371	392	411	373	393	617	659
112	166	162	186	169	187	187	270	296	429	503
76	72	56	56	72	64	80	188	96	224	200

Defendant's Exhibit H

713a

Defendant's Exhibit H

TABLE IV

TABLE VI

TIME	7 - 8 a.m.		8 - 9		9 - 10		10 - 11		11 - 12		12 - 1		1 - 2		2 - 3		3 - 4		4 - 5		5 - 6 P.M.		TOTAL	
Test No.	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2
1.	44	1,077	46	1,170	26	1,000	19	668	21	744	20	720	24	848	26	918	24	876	32	1,148	42	1,488	304	10,588
2.	37	1,444	46	1,332	26	988	17	597	17	612	15	540	13	468	28	1,008	28	1,008	36	1,296	38	1,368	311	11,261
3.	31	988	38	1,368	17	637	14	504	15	540	14	504	13	468	28	1,008	28	1,008	36	1,296	38	1,368	311	11,141
4.																								
5.	39	1,404	39	1,404	26	936	17	612	16	576	16	576	17	612	30	1,080	29	1,044	30	1,080	31	1,116	348	12,528
6.																								
7.	12	432	14	504	10	360	11	396	12	432	10	360	10	360	24	864	21	756	22	792	22	792	188	6,786
8.																								
9.	9	324	12	432	9	324	6	216	7	252	6	216	6	216	6	216	6	216	6	216	6	216	88	3,168
10.	3	108	3	108	3	108	2	72	2	72	2	72	2	72	2	72	2	72	2	72	2	72	27	972
11.	39	1,404	39	1,404	26	936	14	504	14	504	17	612	17	612	17	612	17	612	17	612	17	612	255	9,180
12.																								
13.	38	1,368	38	1,368	25	900	13	468	13	468	13	468	13	468	13	468	13	468	13	468	13	468	193	6,948
14.	38	1,368	38	1,368	26	936	16	576	16	576	16	576	16	576	16	576	16	576	16	576	16	576	238	8,568
15.	36	1,296	36	1,296	26	936	14	504	15	540	15	540	15	540	15	540	15	540	15	540	15	540	224	8,064
16.																								
17.																								
18.	38	1,368	38	1,368	25	900	14	504	14	504	15	540	15	540	15	540	15	540	15	540	15	540	224	8,064
19.	34	918	34	918	11	297	11	297	11	297	12	324	12	324	13	351	14	378	14	378	14	378	186	5,022
20.																								
21.																								
22.																								
23.	73	6,883	79	6,666	36	3,381	21	982	19	889	21	715	27	685	30	550	30	910	30	910	44	699	503	23,737
24.																								
25.	3	30					2	25	1	26	1	26	1	26	1	26	1	26	1	13	1	13	11	184
26.																								
27.																								
28.																								
29.																								
30.																								
Total	480	17,166	511	20,048	376	9,340	240	6,651	233	6,715	219	6,164	225	7,452	312	6,838	312	6,838	410	8,414	486	7,172	3,406	81,943

716a

Defendant's Exhibit H

HOURLY TOTALS OF OUTBOUND TRANSIT VEHICLES AND OCCUPANTS by TIME OF DAY AND BY STATION Wednesday, May 8, 1963

TIME	7 - 8 a.m.		8 - 9		9 - 10		10 - 11		11 - 12		12 - 1		1 - 2		2 - 3		3 - 4		4 - 5		5 - 6 P.M.		TOTAL	
Test No.	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2
1.	19	360	48	120	23	67	24	117	19	186	18	204	23	468	23	618	33	1,188	37	1,622	43	2,474	388	7,554
2.	10	227	10	207	6	24	3	36	6	72	7	132	7	180	7	252	9	322	26	1,147	13	280	116	2,696
3.	9	147	12	147	10	121	7	105	9	138	7	130	8	236	8	283	11	373	10	466	13	868	181	3,770
4.																								
5.	14	370	21	472	10	287	11	247	16	382	14	412	13	401	13	411	15	784	17	981	18	1,624	175	6,732
6.																								
7.	11	321	15	373	9	98	10	122	12	221	10	271	9	226	12	250	13	339	12	340	13	693	156	3,881
8.																								
9.	10	76	17	48	10	24	11	44	10	44	8	48	8	108	8	124	11	316	16	613	16	951	127	2,663
10.	21	607	20	368	14	167	14	117	14	378	13	229	14	330	14	310	14	871	22	991	19	1,618	166	6,000
11.																								
12.																								
13.	2	23	1	10	2	17	1	13			1	27	3	60	2	30	1	13			2	17	17	211
14.	36	288	28	224	22	78	14	91	19	161	16	217	16	224	15	284	21	693	30	1,238	24	1,488	262	5,148
15.	48	643	49	673	31	372	26	324	30	335	36	444	33	378	40	617	44	1,167	46	1,572	48	2,353	438	10,363
16.																								
17.	60	690	67	324	46	210	39	267	40	340	32	410	42	303	39	787	33	1,491	48	2,673	58	4,290	576	12,050
18.																								
19.	3	3	1		2	10			1	3	1	3			1	11	2	23	2	83	2	94	17	247
20.																								
21.																								
22.	40	687	47	340	24	179	24	159	29	386	23	619	30	686	27	910	43	1,611	39	2,877	49	4,649	664	13,666
23.																								
24.	18	116	11	121	12	52	12	41	11	32	13	121	11	172	11	179	17	297	12	1,111	21	1,111	228	2,271
25.																								
26.																								
27.																								
28.																								
29.																								
30.																								

PEDESTRIAN AND OVER-ALL DATA SUMMARY
PITTSBURGH CBD CORDON COUNT
WEDNESDAY, MAY 8, 1963

TABLE VII

All Inbound Vehicles
and
Pedestrians

Autos	Trucks	Transit	Special Bus	Pedestrian
89,214	13,816	3,428	337	16,173

All Outbound Vehicles
and
Pedestrians

86,122	13,606	3,430	244	13,995
175,336	27,422	6,858	581	30,168

SUMMARY CORDON COUNT DATA
AUTO AND TRUCK
BY HOUR BY DIRECTION
PITTSBURGH CBD CORDON COUNT
WEDNESDAY, MAY 8, 1963

TABLE VIII

Period	INBOUND						OUTBOUND					
	Autos	Trucks	Auto Pass.	Loading Factor	Truck Pass.	Loading Factor	Autos	Trucks	Auto Pass.	Loading Factor	Truck Pass.	Loading Factor
7-8 AM	10,809	1,078	18,859	1.74	1,413	1.31	8,289	976	11,117	1.34	1,240	1.27
8-9	12,840	1,266	21,733	1.69	1,712	1.35	7,993	1,204	10,816	1.35	1,573	1.31
9-10	9,081	1,616	13,443	1.48	2,049	1.23	5,803	1,405	7,752	1.34	1,794	1.28
10-11	6,832	1,553	10,264	1.50	1,921	1.24	5,336	1,573	7,316	1.37	1,988	1.26
11-12	6,051	1,393	8,962	1.48	1,681	1.21	5,786	1,351	8,328	1.44	1,673	1.24
12-1 PM	5,748	1,127	8,786	1.53	1,369	1.21	5,582	1,139	8,183	1.47	1,408	1.24
1-2	6,521	1,430	10,005	1.53	1,745	1.22	6,110	1,349	9,143	1.50	1,674	1.24
2-3	6,718	1,345	9,881	1.47	1,649	1.23	7,143	1,357	10,727	1.50	1,670	1.23
3-4	7,248	1,217	10,778	1.49	1,515	1.24	8,302	1,263	12,362	1.49	1,595	1.26
4-5	8,738	1,112	12,792	1.46	1,378	1.24	11,960	1,209	18,719	1.57	1,547	1.28
5-6	8,628	679	12,635	1.46	852	1.25	13,818	780	24,205	1.75	1,054	1.35
6-7	89,214	13,816	138,138	1.55	17,284	1.25	86,122	13,606	128,668	1.49	17,216	1.27

DOCUMENT 9 ANALYSIS

SUMMARY OF VEHICLES & PASSENGERS
CBD CORDON COUNT — PASSENGER VEHICLES,
LIGHT TRUCKS, MEDIUM TRUCKS, HEAVY TRUCKS
11-HOUR PERIOD (7 AM - 6 PM)
WEDNESDAY, MAY 8, 1963

TABLE II

	INBOUND			OUTBOUND			IN & OUT STATION TOTAL		
Station	Pass.	Total Veh.	Carload Factor	Pass.	Total Veh.	Carload Factor	Pass.	Total Veh.	Carload Factor
1	8,713	5,588	1.56	6,306	4,380	1.44	15,019	9,968	1.51
2	11,605	7,489	1.55	6,248	3,863	1.62	17,853	11,352	1.57
3	5,357	3,601	1.49	2,750	1,842	1.49	8,107	5,443	1.49
4	1,940	1,261	1.54	509	340	1.50	2,449	1,601	1.53
5	4,959	3,292	1.51	5,776	4,032	1.43	10,735	7,324	1.47
6	4,363	3,044	1.43	7,171	4,795	1.50	11,534	7,839	1.47
7	5,479	3,337	1.64	5,574	3,440	1.62	11,053	6,777	1.63
8	1,624	1,132	1.43	-----	-----	-----	1,624	1,132	1.43
9	11,447	7,390	1.55	11,076	7,659	1.45	22,523	15,049	1.50
10	7,223	4,978	1.45	12,132	8,401	1.44	19,355	13,379	1.45
11	8,968	6,118	1.47	-----	-----	-----	8,968	6,118	1.47
12	4,201	3,189	1.32	5,298	3,783	1.40	9,499	6,972	1.36
13	8,284	5,597	1.48	8,568	5,797	1.48	16,852	11,394	1.48
14	6,295	4,065	1.55	5,807	3,795	1.53	12,102	7,860	1.54
15	8,905	5,825	1.53	7,151	4,909	1.46	16,056	10,734	1.50
16	10,787	7,761	1.39	5,116	4,725	1.08	15,903	12,486	1.27
17	-----	-----	-----	12,576	8,545	1.47	12,576	8,545	1.47
18	11,836	7,438	1.59	-----	-----	-----	11,836	7,438	1.59
19	6,518	4,374	1.49	-----	-----	-----	6,518	4,374	1.49
20	-----	-----	-----	5,433	3,615	1.50	5,433	3,615	1.50
21	4,311	2,744	1.57	-----	-----	-----	4,311	2,744	1.57
22	-----	-----	-----	9,932	7,025	1.41	9,932	7,025	1.41
23	-----	-----	-----	3,196	2,132	1.50	3,196	2,132	1.50
24	6,927	4,709	1.47	4,716	3,303	1.43	11,643	8,012	1.45
25	-----	-----	-----	6,292	4,360	1.44	6,292	4,360	1.44
26	7,483	5,005	1.50	-----	-----	-----	7,483	5,005	1.50
27	8,197	5,093	1.61	-----	-----	-----	8,197	5,093	1.61
28	-----	-----	-----	8,127	5,214	1.56	8,127	5,214	1.56
29	-----	-----	-----	4,148	2,669	1.55	4,148	2,669	1.55
30	-----	-----	-----	1,984	1,104	1.80	1,984	1,104	1.80
Total	155,422	103,030	1.51	145,886	99,728	1.46	301,308	202,758	1.49

720a

Defendant's Exhibit H

SUMMARY OF AUTOS & PASSENGERS
WITH CARLOADING FACTORS BY STATION
PITTSBURGH CBD CORDON COUNT
WEDNESDAY MAY 8, 1963
(7 AM - 6 PM)

	INBOUND			OUTBOUND			IN & OUT TOTAL	
tion	Pass.	Autos	Carload Factor	Pass.	Autos	Carload Factor	Pass.	Autos
1	7,669	4,756	1.61	5,263	3,565	1.48	12,932	8,321
2	10,771	6,843	1.57	5,518	3,269	1.69	16,289	10,112
3	4,603	3,011	1.53	2,413	1,562	1.55	7,016	4,573
4	1,776	1,143	1.55	452	308	1.47	2,228	1,451
5	4,466	2,895	1.54	4,936	3,370	1.47	9,402	6,265
6	3,991	2,735	1.46	6,556	4,313	1.52	10,547	7,048
7	5,066	3,015	1.68	5,016	3,042	1.65	10,082	6,057
8	1,392	951	1.46	—	—	—	1,392	951
9	10,619	6,742	1.58	10,264	7,005	1.47	20,883	13,747
10	5,687	3,739	1.52	9,744	6,487	1.50	15,431	10,226
11	7,459	4,889	1.53	—	—	—	7,459	4,889
12	2,952	2,154	1.37	4,109	2,811	1.46	7,061	4,965
13.	7,458	4,933	1.51	7,463	5,032	1.48	14,921	9,965
14	5,785	3,671	1.58	5,280	3,405	1.55	11,065	7,076
15	8,049	5,183	1.55	6,565	4,421	1.49	14,614	9,604
16.	9,151	6,424	1.42	4,279	4,078	1.05	13,430	10,502
17	—	—	—	11,125	7,383	1.51	11,125	7,383
18	10,852	6,646	1.63	—	—	—	10,852	6,646
19	5,941	3,909	1.53	—	—	—	5,941	3,889
20	—	—	—	5,091	3,343	1.52	5,091	3,343
21	4,067	2,570	1.58	—	—	—	4,067	2,570
22	—	—	—	8,679	6,014	1.44	8,679	6,014
23	—	—	—	2,995	1,973	1.52	2,995	1,973
24	6,029	3,986	1.51	4,012	2,720	1.48	10,041	6,706
25	—	—	—	5,513	3,735	1.48	5,513	3,735
26	6,706	4,388	1.53	—	—	—	6,706	4,388
27	7,649	4,650	1.64	—	—	—	7,649	4,650
28	—	—	—	7,438	4,664	1.60	7,438	4,664
29	—	—	—	3,973	2,518	1.58	3,973	2,518
30	—	—	—	1,984	1,104	1.80	1,984	1,104
TAL	138,138	89,214	1.55	128,668	86,122	1.49	266,806	175,336

MASS TRANSIT
VEHICLE AND PASSENGER SUMMARY
PITTSBURGH CBD CORDON COUNT
WEDNESDAY, MAY 8, 1963

TABLE X

Time Period	INBOUND Transit Veh.	Transit Pass.	Load Factor	OUTBOUND Transit Veh.	Transit Pass.	Load Factor
-8 AM	400	17,546	43.86	348	4,656	13.38
-9	455	20,948	46.04	456	3,233	7.14
-10	276	9,340	33.84	273	1,844	6.75
-11	240	6,851	28.55	233	1,754	7.53
-12	232	4,720	20.34	229	2,727	11.91
-1 PM	219	4,104	18.74	218	3,441	15.78
-2	225	4,380	19.47	231	4,334	18.76
-3	253	3,832	15.15	242	6,368	26.31
-4	312	4,658	14.93	320	10,076	31.49
-5	410	4,414	10.77	402	18,007	44.79
-6	406	3,172	7.81	478	25,708	53.78

RAIL PASSENGER AND NON-SCHEDULED MASS TRANSIT VEHICLE SUMMARY
PITTSBURGH CBD CORDON COUNT
WEDNESDAY, MAY 8, 1963

Time Period	INBOUND Rail[A] Pass.	Special[B] Buses	OUTBOUND Rail Pass.	Special Buses
-8 AM	437	34	73	26
-9	1,697	32	94	25
-10	48	32	56	20
-11	35	42	40	23
-12	---	31	73	15
-1 PM	---	30	49	1.
-2	30	32	82	38
-3	---	19	---	18
-4	---	41	180	19
-5	40	29	244	15
-6	117	15	1,613	14

Note: A - Number of railroad vehicles (trains or individual coaches) was not gathered since these data were not relevant to the study.

B - Only a vehicle count of special (non-scheduled, school, etc.) buses was made. No enumeration of these vehicle loads was made since special bus passengers were not destined to points within the CBD during the time of the study.

Defendant's Exhibit H

BUSES, TROLLEYS, PASSENGERS
PITTSBURGH CBD CORDON COUNT
WEDNESDAY, MAY 8, 1963
(7 AM - 6 PM)

Station	Buses Trolleys Inbound	Buses Trolleys Outbound	Buses Trolleys Total	Passenger Inbound	Passenger Outbound	Passenger Total
1	385	320	705	9,800	7,538	17,338
2	306	114	420	5,905	3,096	9,001
3	211	101	312	5,544	2,776	8,320
4	---	---	---	---	---	---
5	206	175	381	7,609	6,732	14,341
6	---	---	---	---	---	---
7	126	126	252	3,107	3,601	6,708
8	---	---	---	---	---	---
9	91	127	218	1,671	2,665	4,336
10	27	226	253	747	6,080	6,827
11	234	---	234	6,155	---	6,155
12	---	---	---	---	---	---
13	191	17	208	3,862	251	4,113
14	245	262	507	4,766	5,148	9,914
15	254	452	706	6,966	10,562	17,528
16	---	---	---	---	---	---
17	---	574	574	---	12,030	12,030
18	391	---	391	8,346	---	8,346
19	196	---	196	3,548	---	3,548
20	---	17	17	---	247	247
21	---	---	---	---	---	---
22	---	---	---	---	---	---
23	---	---	---	---	---	---
24	553	464	1,017	15,757	12,608	28,365
25	---	---	---	---	---	---
26	---	---	---	---	---	---
27	12	---	12	182	---	182
28	---	206	206	---	4,441	4,441
29	---	249	249	---	4,373	4,373
30	---	---	---	---	---	---
Total	3,428	3,430	6,858	83,965	79,148	166,113

Note: In addition 2,419 railroad passengers were recorded entering the CBD and 2,454 were recorded leaving the CBD during the 11 hour study period. These values do not include patrons entering the CBD from the P & L E Station.

CBD ACCUMULATION
ALL VEHICLES
PITTSBURGH CBD CORDON COUNT
WEDNESDAY, MAY 8, 1963

TABLE XI

Time Period	Taxis & Autos	Trucks	Transit Vehicles	Special Buses	Total Vehicles
Before 7 AM	2,523	404*	83*	10*	3,020*
7-8	5,043	506	135	18	5,702
8-9	9,890	528	136	25	10,379
9-10	13,168	739	139	37	14,083
10-11	14,664	719	146	56	15,585
11-12	14,929	761	149	72	15,911
12-1 PM	15,095	740	150	71	16,056
1-2	15,506	821	144	65	16,536
2-3	15,081	809	155	66	16,111
3-4	14,027	763	147	88	15,025
4-5	10,805	666	155	102	11,728
5-6	5,615	565	83	103	6,366

*Estimated

ACCUMULATION OF PEOPLE WITHIN CBD FROM PITTSBURGH CORDON COUNT WEDNESDAY, MAY 8, 1963

TABLE II

Time Period	Auto-Taxi Truck Pass.	Transit[2] Pass.	Pedestrian	R.R.[3]	Grand Total All Persons
Before 7 AM	4,344	5,000[1]	1,000	143	10,487
7-8	12,259	17,890	3,232	527	33,908
8-9	22,415	35,605	6,857	2,130	67,007
9-10	28,361	43,101	7,804	2,122	81,388
10-11	31,242	48,198	8,105	2,117	89,662
11-12	31,884	50,191	8,316	2,094	92,485
12-1 PM	32,448	50,854	8,528	2,045	93,875
1-2	33,381	50,900	8,370	1,993	94,644
2-3	32,514	48,364	8,139	1,993	91,010
3-4	30,850	42,946	7,759	1,813	83,368
4-5	24,754	29,353	6,153	1,609	61,869
5-6	11,772	6,817	3,178	108	21,875

[1]Estimated

[2]Transit passengers include all persons accumulated within CBD who arrived by bus or streetcar. Patrons on non scheduled transit vehicles were not enumerated.

[3]Figures shown represent only those railroad patrons who have passed through the CBD cordon by train and excludes rail patrons who have entered the CBD as pedestrians via the Smithfield Street Bridge from the P & L E Station.

PEDESTRIANS ENTERING & LEAVING CBD
BY CORDON STATION
PITTSBURGH CBD CORDON COUNT
WEDNESDAY, MAY 8, 1963
(7 AM - 6 PM)

TABLE XIII

Station	Inbound	Outbound	Total
1	344	365	709
3	1,816	1,454	3,270
4	824	652	1,476
5	2,269	2,008	4,277
7	1,696	1,294	2,990
8	2,090	2,118	4,208
10	54	50	104
11	1,198	965	2,163
13	864	663	1,527
14	834	641	1,475
15	2,933	2,697	5,630
24	1,251	1,088	2,339
Total	16,173	13,995	30,168

Note: 1. Stations recording no pedestrians have been eliminated from this table.
2. Values shown for Station 24 include rail passengers who have entered CBD from the P & L E Station located outside the cordon area.

Pedestrian Counts

Time Period	Inbound	Outbound
7-8 AM	2,823	391
8-9	4,273	648
9-10	1,400	453
10-11	894	393
11-12	918	707
12-1 PM	1,382	1,170
1-2	887	1,045
2-3	856	1,087
3-4	1,031	1,411
4-5	904	2,510
5-6	805	3,780
Total	16,173	13,995

Defendant's Exhibit H

VEHICLE AND PASSENGER SUMMARY ENTERING AND LEAVING CBD
1955 City of Pittsburgh Cordon Count
Thursday, May 5, 1955 (8AM-6PM)

TABLE A

Time Period	All Private Vehicles			Private Vehicle Passengers		
	In	Out	Total	In	Out	Total
7-8 a.m.	---	---	---	---	---	---
8-9	13,399	10,395	23,794	19,912	10,651	30,563
9-10	10,880	8,303	19,183	13,070	9,388	22,458
10-11	8,433	7,940	16,373	10,872	9,240	20,112
11-12	7,914	7,762	15,676	9,376	9,235	18,611
12-1 p.m.	7,366	7,686	15,052	8,696	9,975	18,671
1-2	8,739	7,820	16,559	10,711	10,243	20,954
2-3	9,002	9,067	18,069	10,669	10,630	21,299
3-4	10,244	10,049	20,243	11,610	13,268	24,878
4-5	12,446	14,022	26,468	17,742	20,939	38,681
5-6	12,915	15,198	28,113	18,957	25,429	44,386
TOTAL	107,663	103,475	221,138	131,615	128,998	260,613

ERK:lm

7-15-63

TRUCK AND PASSENGER SUMMARY ENTERING AND LEAVING CBD
1955 City of Pittsburgh Cordon Count
Thursday, May 5, 1955 (8 AM-6 PM)

TABLE B

	In	Out	Total	In	Out	Total
a.m.	---	---	---	---	---	---
	1,662	1,732	3,394	2,417	2,448	4,865
	1,892	1,887	3,779	2,546	2,519	5,065
	1,722	1,734	3,456	2,251	2,527	4,778
	1,544	2,144	3,688	2,048	2,853	4,901
p.m.	1,334	1,698	3,032	1,752	2,282	4,034
	1,630	1,782	3,412	2,109	2,318	4,427
	1,612	1,813	3,425	2,065	2,344	4,409
	1,737	1,814	3,551	2,322	2,389	4,711
	1,376	1,672	3,048	1,874	2,246	4,120
	821	1,026	1,847	1,119	1,373	2,492
	15,330	17,302	32,632	20,410	23,299	43,802

Defendant's Exhibit H

BUS AND PASSENGER SUMMARY ENTERING AND LEAVING CBD
1955 City of Pittsburgh Cordon Count
Thursday, May 5, 1955 (8 AM-6 PM)

TABLE C

Time Period	Buses			Bus Passengers		
	In	Out	Total	In	Out	Total
7-8 a.m.	---	---	---	---	---	---
8-9	380	298	678	11,069	2,082	13,151
9-10	200	191	391	4,881	1,034	5,915
10-11	180	138	318	3,647	1,031	4,678
11-12	171	138	309	2,774	1,693	4,467
12-1 p.m.	170	137	307	2,594	2,014	4,608
1-2	177	134	311	2,889	2,408	5,297
2-3	206	143	349	2,951	2,901	5,852
3-4	244	190	434	3,319	4,434	7,753
4-5	329	212	541	4,184	7,238	11,422
5-6	335	314	649	2,672	12,420	15,092
TOTAL	2,392	1,895	4,287	40,980	37,255	78,235

RRK:lm

7-15-63

STREETCAR AND PASSENGER SUMMARY ENTERING AND LEAVING CBD
1955 City of Pittsburgh Cordon Count
Thursday, May 5, 1955 (8AM-6PM)

TABLE D

	Streetcars				Streetcar Passengers			
	In	Out	Total	Per Cent of Total	In	Out	Total	Per Cent of Total
a.m.	---	---	---	---	---	---	---	---
	365	366	731	15.81	19,264	4,862	24,126	16.81
	192	229	421	9.11	8,493	2,361	10 854	7.55
1	173	170	343	7.42	6,346	2,237	8,583	5.98
2	165	169	334	7.22	4,830	3,369	8,199	5.71
p.m.	164	167	331	7.16	4,508	3,948	8,456	5.89
	170	165	335	7.25	5,031	4,680	9,711	6.77
	198	179	377	8.15	5,132	5,604	10,736	7.48
	234	234	468	10.12	5,780	8,439	14,219	9.91
	316	267	583	12.61	7,284	13,672	20,956	14.60
	322	378	700	15.14	4,652	23,037	27,689	19.29
	2,299	2,324	4,623	100.00	74,320	72,209	143.529	100.00

730a

Defendant's Exhibit H

ACCUMULATION 1955 CBD CORDON COUNT

TABLE I

Time Period	All Vehicles	All Vehicle Passengers	Pedestrians	Transit Passengers
Before 7 a.m.	3,000*	5,000*	1,000	5,000
7-8 a.m.	4,092	10,100	2,650	13,039
8-9	7,096	19,361	4,902	27,441
9-10	9,673	23,043	5,737	33,573
10-11	10,166	24,675	6,205	37,682
11-12	11,318	24,816	6,643	39,143
12-1 p.m.	10,998	23,537	6,978	39,703
1-2	11,917	24,005	7,075	40,054
2-3	11,852	24,044	7,139	39,582
3-4	12,047	22,386	7,352	36,923
4-5	10,471	19,189	6,248	30,535
5-6	8,188	12,717	4,182	12,150

*Estimated

RK:lm

7-12-63

Defendant's Exhibit H

ACCUMULATION OF ALL PERSONS ENTERING AND LEAVING THE CBD
1955 City of Pittsburgh Cordon Count
Thursday, May 5, 1955 (8AM-6PM)

TABLE F

Period	Private Vehicle Passengers	Streetcar Passengers	Bus Passengers	Pedestrians	Trains	Total Persons
Before 7 a.m.	6,000	5,000	3,000	1,000	400	15,400
7-8	13,000	13,039	9,000	2,650	1,509	39,198
8-9	22,261	27,441	17,987	4,902	6,129	78,720
9-10	25,943	33,573	19,681	5,737	6,108	91,042
10-11	27,375	37,682	22,297	6,205	6,095	99,854
11-12	27,716	39,143	23,378	6,643	6,030	102,910
12-1 p.m.	26,437	39,703	23,958	6,978	5,890	102,966
1-2	26,905	38,792	24,439	7,075	5,744	102,955
2-3	26,944	38,320	24,489	7,138	5,744	102,636
3-4	25,286	35,661	23,374	7,352	5,234	96,907
4-5	22,089	29,273	20,320	6,248	4,655	82,585
5-6	15,617	10,888	10,572	4,182	398	41,657

amk:lm

7-15-63

Adjudication and Decree Nisi of the Court of Common Pleas of Allegheny County (printed in the Appendix to the Petition for Certiorari at pages 84a through 102a).

Exceptions to Decree *Nisi*.

(Filed April 5, 1971.)

And Now come the plaintiffs above-named, by their attorneys, Leonard Boreman, Richard H. Martin and Baskin, Boreman, Wilner, Sachs, Gondelman & Craig, and except to the adjudication, including the Decree *Nisi* filed herein, as mose particularly set forth below:

1. Plaintiffs except to Finding of Fact Fifteenth.

2. Plaintiffs except to Finding of Fact Sixteenth.

3. Plaintiffs except to Finding of Fact Seventeenth.

4. Plaintiffs except to Finding of Fact Eighteenth.

5. Plaintiffs except to Finding of Fact Twentieth.

6. Plaintiffs except to Finding of Fact Twenty-first.

7. Plaintiffs except to Finding of Fact Twenty-second.

8. Plaintiffs except to Finding of Fact Twenty-third.

9. Plaintiffs except to Finding of Fact Twenty-fourth.

10. Plaintiffs except to Finding of Fact Twenty-fifth.

11. Plaintiffs except to Finding of Fact Twenty-sixth.

12. Plaintiffs except to Finding of Fact Twenty-seventh.

13. Plaintiffs except to Conclusion of Law Second.

14. Plaintiffs except to Conclusion of Law Third.

15. Plaintiffs except to Conclusion of Law Fifth.

16. Plaintiffs except to Conclusion of Law Sixth.

17. Plaintiffs except to Conclusion of Law Eighth.

18. Plaintiffs except to Conclusion of Law Ninth.

19. Plaintiffs except to Conclusion of Law Tenth.

20. Plaintiffs except to Conclusion of Law Eleventh.

21. The Decree is against the law and against the weight of the evidence.

22. Plaintiffs except to the Court's failure to find certain facts and conclusions of law as set out in their proposed Findings of Fact and Conclusions of Law filed herein, as more particularly set forth below:

a) Plaintiffs except to the failure of the Court to find their Proposed Findings of Fact Nos. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33.

b). Plaintiffs except to the failure of the Court to find their Proposed Conclusions of Law Nos. 1, 2, 3, 4 and 5.

c). Plaintiffs except to the failure of the Court to grant the relief prayed for in their complaint herein.

Respectfully submitted,

BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG,
LEONARD BOREMAN,
RICHARD H. MARTIN,

Attorneys for Plaintiffs.

Opinion and Final Decree of the Court en banc, Allegheny County, Pennsylvania (printed in the Appendix to the Petition for Certiorari at pages 78a through 83a).

Opinion of the Commonwealth Court of Pennsylvania (printed in the Appendix to the Petition for Certiorari at pages 56a through 77a).

Petition for Reargument.

Appellants, pursuant to Rule 116 of this Honorable Court and Rule 71 of the Rules of the Supreme Court of Pennsylvania, respectfully request the Court to grant reargument in the above case and in support thereof state as follows:

1. Despite the unanimous finding of the Court that the tax rate of 20% of gross receipts imposed upon parking operators by the Pittsburgh Parking Tax Ordinance is unreasonable and excessive, the majority has held that it is without power to invalidate the tax or reduce the tax rate. The existence or non-existence of such power in the Court is a vital issue under the due process clause under both the Federal and

Pennsylvania Constitutions and justifies through briefing which was not done because the power of the Court under the due process clauses, and as enunciated in the preceding Parking Tax cases, was believed to exist. Although this power was clearly indicated in *Philadelphia v. Samuels,* 338 Pa. 321, 12 A. 2d 79 (1940) (if sufficient evidence were furnished as it was in this case), it is respectfully submitted that in holding to the contrary, the majority erroneously gave controlling weight to the dictum in the subsequent case of *Philadelphia v. Eglin's Garages, Inc.,* 342 Pa. 142, 144, 19 A. 2d 845 (1941) as overruling *Samuels.* Yet the power was never examined in that case, since the Court found the evidence of unreasonableness to be clearly insufficient as indeed it was. Moreover, in the subsequent case of *McGillick v. City of Pittsburgh,* aff'd *per curiam,* 415 Pa. 581, 203 A. 2d 480 (1964), the Court reaffirmed the implication of its statement in *Samuels,* when it stated that it could "find *nothing in the record* before us to indicate that the tax rate of 10% of the gross receipts is excessive or confiscatory". (Emphasis Supplied)

In view of the important issue of due process under both the Federal and State Constitutions, and in the light of the foregoing statements of the Supreme Court of Pennsylvania, it is submitted that this question should be more thoroughly considered and an opportunity afforded to inquire into this question.

2. It is respectfully submitted that the Court both misread and misinterpreted the effect and operation of

the Local Tax Enabling Act of December 31, 1965, P. L. 1257, 53 P. S. § 6901 *et seq.* The effect and operation of this Act upon the instant issue was never raised in the Court below nor in this Court, and a sufficient opportunity to examine and brief the questions raised by the majority opinion was not available to Appellants. It is now settled that this Act does not preclude equity jurisdiction where as here, constitutional questions are raised, and in addition does not preclude the consideration of non-constitutional questions once equity has taken jurisdiction. *Lynch v. Owen J. Roberts School District*, 430 Pa. 461, 465, 144 A. 2d 1, 3 (1968), cited in the dissenting opinion.

Furthermore, an opportunity was not afforded to make the Court aware that two reasons exist for not proceeding under this Act. First, the proceeding outlined in the Act for an appeal in 30 days applies only to an ordinance enacted "for the first time", 1965 December 31, P. L. 1257, § 6, as amended, 53 P. S. 6906. The Ordinance in question was not enacted "for the first time". It is a reenactment of the same Ordinance enacted, except for the rate of tax, first in 1962 and later reenacted in 1968, governing the year 1969. Although the 1970 Ordinance is technically a new ordinance it is simply a reenactment of the two previous ordinances, and a question exists as to whether, under this situation, the right of appeal within 30 days exists under the Act *Owen J. Roberts School District v. Pickar*, 286 A. 2d 14 (1972), decided by this Court.

Secondly, the Ordinance is imposed on parking garage and lot operators of which, to the knowledge of Appellants, there are not 25 "aggrieved parties". The Appellants, constituting 71% of the parking spaces in Pittsburgh, other than the Parking Authority, consist of six in number and it is believed that 25 "aggrieved parties" in the parking business in Pittsburgh do not exist.

See, on the foregoing two reasons, *Glassmoyer v. O. J. Roberts School District*, 50 D. & C. 2nd, 499 (Chester County, 1969). In addition to the foregoing, laches cannot be attributed to Appellants since the Ordinance went into effect February 1, 1970 and suit in the instant case was filed on February 20, 1970. *Glassmoyer v. O. J. Roberts School District, supra.*

3. Because the effect and operation of the Local Tax Enabling Act, *supra*, was not raised either in the Court below or in this Court, Appellants had no opportunity to consider and brief the question of the power of the Court, sitting in equity, to invalidate the tax or reduce the rate of taxation under that Act, where, as here, a substantial question exists as to whether the Appellants could proceed under that Act. We respectfully submit that an examination of the Local Tax Enabling Act, in the light of the intent of the Legislature, requires an inquiry as to whether or not an Equity Court may not utilize the powers set forth in that Act in an issue raised as here, particularly where the Court unanimously finds the rate to be unreasonable.

4. Appellants state that the Court completely misread and misinterpreted their argument with respect to the denial of equal protection of the law under both Federal and State Constitutions. Appellants did not assert the argument—in fact Appellants expressly disclaimed it (see page 9 of Appellants' Brief)—regarding the distinction between residential and non-residential parking and do *not* rest their case on this basis. Likewise, Appellants do *not* rest their case on any so-called "interpretation" of the preamble to the Pittsburgh Parking Tax Ordinance. The Appellants rest this phase of their case directly on the principles set forth in the leading case of *Commonwealth v. Life Insurance Co. of Pa.*, 419 Pa. 370, 214 A. 2d 309 (1965), namely, that the Ordinance *must rest on some reasonable basis*, and there is not credible evidence in the record to sustain any basis for singling out the parking business for a special tax. This contention, contrary to the statement of the majority opinion, has never been raised or decided in any previous parking tax case and is one of first impression. Appellants argument on this point is outlined in I, paragraphs C and D, pages 8-23 of their Brief, particularly, the argument (pages 15-23) with reference to the effect of *The Parking Authority Law*, Act of 1947, June 5, P. L. 488, as amended, 53 P. S. § 341, *et seq.*

Respectfully submitted,

LEONARD BOREMAN,
RICHARD H. MARTIN,
BASKIN, BOREMAN, WILNER, SACHS,
GONDELMAN & CRAIG,
Attorneys for Appellants.

Order.

Now, June 29, 1972 it is hereby ordered that the above appeal be reargued and for this purpose shall be listed on the September Argument List at Harrisburg on a date to be hereafter fixed and noticed thereof given to the parties.

BY THE COURT,
JAMES S. BOWMAN,
P. J.

CERTIFIED FROM THE RECORD,
Jun. 29, 1972.

FRANCIS C. BARBUSH,
Chief Clerk.

Opinion of the Commonwealth Court, after Reargument (printed in the Appendix to the Petition for Certiorari at pages 51a through 54a).

Petition for Allowance of Appeal.

To the Honorable, the Judges of said Court:

1. Your petitioners are the owners and/or lessees of parking lots and parking garages situate in the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania, comprising a total of approximately 71% of the total commercial parking spaces in the downtown area of the City of Pittsburgh.

2. On February 20, 1970, your petitioners filed a Complaint in Equity in the Court of Common Pleas of Allegheny County to restrain the City of Pittsburgh

from enforcing the provisions of Ordinance No. 704, approved by the Council of the City of Pittsburgh on December 31, 1969 ("The Parking Tax Ordinance"), which imposed a tax of 20% of gross receipts on all parking transactions, and for a refund of all taxes paid thereunder.

3. The matter came on for trial before the Honorable Arthur Wessel, Jr. on September 13-15, 1970, and on March 19, 1971, Judge Wessel issued a Decree *Nisi*, in favor of respondent. Your petitioners herein filed a timely Exceptions to the Decree *Nisi*, which were dismissed by the Court *en banc* on July 11, 1971, at which time a Final Decree was entered.

4. Your petitioners filed a timely appeal to the Commonwealth Court of Pennsylvania from said Final Decree which, after argument on February 22, 1972, issued its Order and Opinion on June 8, 1972, affirming the Order of the court below by a four to three decision. True and correct copies of the majority and minority opinions of the Commonwealth Court are attached hereto, made a part thereof and marked Exhibits "A" and "B", respectively.

5. Your petitioners filed a Petition for Reargument in the Commonwealth Court on June 29, 1972, and on the basis thereof reargument was granted and argument heard by said Court on September 11, 1972. On October 11, 1972, the Commonwealth Court, again by a four to three vote, issued its decision adhering to its prior decision affirming the order of the court below. True and correct copies of the majority and

minority opinions of the Commonwealth Court, issued after reargument, are attached hereto, made a part hereof and marked Exhibits "C" and "D", respectively.

6. Your petitioners have raised the following questions in the within appeal:

a). Does the Parking Tax Ordinance violate Article VIII, Section I of the Pennsylvania Constitution (uniformity clause) and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by separately classifying the parking business for purposes of taxation where there is no reasonable basis in fact for so doing, and where the basis for classification is directly contrary to the stated findings of fact of the Pennsylvania Legislature and the decisions of the Supreme Court of Pennsylvania? (Answered in the negative by the courts below.)

b). Does the Parking Tax Ordinance violate the Pennsylvania Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution by imposing a rate which is so excessive and unreasonable as to amount to a confiscation of plaintiffs' property? (Answered in the negative by the courts below.)

c). Does a court of equity have jurisdiction and competency to dispose of both constitutional and non-constitutional challenges to a taxing statute, despite the existence of a statutory remedy, where both challenges are raised in a single action and where the

Commonwealth Court has unanimously found the 20% tax to be unreasonable? (Answered in the negative by the Commonwealth Court.)

d). Does Section 6 of the Local Tax Enabling Act, providing that not less than "twenty-five aggrieved taxpayers" may challenge a tax ordinance by initiating a statutory appeal, violate equal protection and due process where a substantial portion of the industry subject to the tax would be denied access to the courts thereby? (Answered in the negative by the Commonwealth Court.)

e). Does a rate of taxation, which is unreasonably high and has the effect of prohibiting private enterprise in favor of public control of the parking industry, violate due process and equal protection of law? (Answered in the negative by the Commonwealth Court.)

7. Your petitioners pray this Honorable Court to grant their Petition for Allowance of Appeal in this matter for the reasons set forth below, in the record, and, more particularly, in their briefs herein, which have been presented to this Court simultaneously herewith:

a). The record in this case includes, as Plaintiffs' Exhibit "I", detailed financial examination of the parking operations of each of petitioners and solidly supports the devastating effect of this tax on these operations. Nevertheless, the Commonwealth Court, by a four judge majority, refused to find that

the tax was confiscatory but did find that the tax was "unreasonably high" and could not be passed on to petitioners' customers. Three dissenting judges agreed that the tax was "unreasonably high" and after reargument stated that they would hold "the unreasonable high 20% parking tax to be confiscatory". Despite the foregoing, the four judge majority refused to render any relief to petitioners, holding that the court was without power to interfere with the legislative function of taxation, not only where the tax was "unreasonable" but even if it were confiscatory.

The United States Supreme Court has recognized, however, that despite the great legislative power of taxation, that power is not wholly without constitutional limits and that the due process and equal protection clauses of the United States Constitution do provide some measure of protection against the abusive exaction of a tax. *A. Magnano Co. v. Hamilton*, 292 U. S. 40, 54 S. Ct. 499 (1934); *Wagner v. Baltimore*, 239 U. S. 207, 36 S. Ct. 66 (1915); *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 19 S. Ct. 553 (1899); see *Allied Stores of Ohio, Inc. v. Bowers*, 358 U. S. 522, 79 S. Ct. 437 (1959); *Morton Salt Co. v. City of South Hutchinson*, 159 F. 2d 897 (10th Cir. 1947).

Pennsylvania law has also long recognized that there are constitutional limits upon the power of the Legislature to tax. *Washington Avenue*, 69 Pa. 352 (1971). Indeed, in *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940), the Supreme Court of

Pennsylvania, in passing upon a parking tax similar to that now at issue, but at one-half the rate, stated that, if a proper factual showing is made, a tax rate may be "so high as to result in taking property without due process". 338 Pa. at 327, 12 A. 2d at 82. In *Samuels*, the Supreme Court indicated that the two essential elements that must be demonstrated to invalidate a tax as confiscatory and contrary to due process are: first, that the tax could not be passed on to patrons; and second, that more than an occasional operator could not afford to continue in business under the tax. Contrary to the implication in the original majority opinion by Judge Rodgers, *Philadelphia v. Eglin's Garages, Inc.*, 342 Pa. 142, 19 A. 2d 845 (1941) does not overrule *Samuels* but merely reaffirms the strict requirements of *Samuels*. In the instant case, the record demonstrates, and the Commonwealth Court has unanimously found, that both essential elements have been demonstrated by these petitioners.

b). Despite the unanimous finding of the Commonwealth Court that a tax of 20% of gross receipts was "unreasonable", and despite the fact that the equity jurisdiction or competency of the court has never been challenged at any point in this law suit, the four member majority of the Commonwealth Court held that the court did not possess the power to enjoin this unreasonable tax, to make a finding as to what tax rate would be unreasonable or to remand the matter to the lower court for such a finding. According to the majority of the Commonwealth Court,

the petitioners could only obtain relief from this unreasonable tax by utilizing the statutory appeal procedures of Section 6 of the Local Tax Enabling Act, 53 P. S. § 6906. Contrary to their position, the three member minority of the Commonwealth Court, relying on *Lynch v. Owen J. Roberts School District*, 430 Pa. 461, 465, 244 A. 2d 1, 3 (1968), held that it "was not necessary for these appellants to proceed under the statute to test the constitutionality of a tax measure", and would remand the case to the court below to determine a reasonable tax rate.

It is beyond doubt that the Legislature of Pennsylvania, in Section 6 of the Local Tax Enabling Act, 53 P. S. 6906, entrusted the power to review the reasonableness of tax rates such as that now before this Court to a *court*, as opposed to an administrative body. The plain meaning of the Act is that the Legislature intended that a *court* be duty bound to reduce the rate of taxation if, as is true of this case, the tax is unreasonable. The majority of the Commonwealth Court ruled, in effect, that this statutory remedy was *exclusive* and *mandatory* even though a challenge to the particular tax in question raises substantial constitutional challenges to the tax itself and where *all* of the parties and *all* of the various courts were satisfied to allow the case to proceed in equity. Under these circumstances, applying the principles of *Lynch*, the equity jurisdiction of the courts of this Commonwealth cannot be said to be powerless to mold a remedy herein.

c). The procedure set forth in the statutory remedy provided in Section 6 of the Local Tax Enabling Act, *supra*, is inadequate as a means of testing the reasonableness of the tax rate for these petitioners since said Act requires that "twenty-five aggrieved taxpayers" must proceed thereunder and, thereby, requires that petitioners, who number only twelve but represent a substantial segment of the parking industry and pay over 60% of the tax, may not file a statutory appeal unless they can successfully solicit 15 or 20 private clubs, marginal operators and family operations to participate in such litigation. Such a standing requirement as this, without a provision that taxpayers who pay substantial portions of the tax may also file such an appeal, denies immediate access to the courts to the bulk of the taxpaying group and, therefore, violated due process and equal protection of the law.

d). Finally, the four member majority of the Commonwealth Court, relying on language in *Magnano, supra*, to the effect that a tax will be allowed to stand unless the record indicates the exertion by the legislature of a different and forbidden power, failed to consider the fact that neither *Magnano* nor all of the cases which subsequently faced similar issues of taxation were faced with the tax, such as in the case now before this Court, which is imposed on an industry composed of both public and private bodies in direct competition with each other. It is quite clear from the record of this case that the 20% parking tax

ordinance will necessarily have the effect of driving the private operators out of the parking business and leaving the field exclusively to the Public Parking Authority. Clearly this is so since the Public Parking Authority pays no real estate taxes and is enabled to charge lower parking rates knowing it will be subsidized should it sustain a loss. In addition to the obvious inequities of such a situation, said tax flies directly in the face of the legislative intent as express in the Parking Authority Law, 1947, P. L. 458, § 1, as amended, 53 P. S. § 342(i):

> "(i) that it is intended that the authority cooperate with all existing parking or parking terminal facilities, or both so that private enterprise and government may mutually provide adequate parking services for the convenience of the public."

e). The Commonwealth Court completely misinterpreted your petitioners' argument with respect to the denial of equal protection of the law, both under the Constitutions of the United States and Pennsylvania. Contrary to the assertions of the Commonwealth Court set forth in the majority opinion, your petitioners do not rest their case—in fact, they expressly disclaimed it (see pg. 9 of appellant's brief)—regarding any distinction between residential and non-residential parking, nor do your petitioners rest their case on any so-called "interpretation" of the preamble to the Pittsburgh Parking Tax Ordinance. Your petitioners rest this phase of their case directly on the

principles set forth in the leading case of *Commonwealth v. Life Assurance Co. of Pa.*, 419 Pa. 370, 214 A. 2d 309 (1965), decided by this Court, namely, that the Ordinance *must rest on some reasonable* basis. Not only is there (1) no credible evidence in this record to sustain *any* basis for singling out the parking business for a special tax, but (2) the reasons for, and finding of fact enacted into law by, *The Parking Authority Law*, the Act of 1947, P. L. 458, 53 P. S. 341, *et seq.*, directly destroy any reasonable basis for the Pittsburgh Parking Tax Ordinance. This issue, contrary to the statement of the majority opinion, and wholly misread by the majority opinion, has never been *raised* or *decided* in *any* previous parking tax case and is one of first impression.

Your petitioners' position on this point is outlined in Part I, paragraphs C and D, pages 8-23, of their brief, particularly the argument (pages 15-23) with reference to the effect of *The Parking Authority Law, supra*, in nullifying any basis for the Pittsburgh Parking Tax.

f). The issue discussed in the dissenting opinion of the Commonwealth Court, to-wit, the existence of an unreasonable and excessive tax on private parking operators which threatens to destroy the private parking industry in Pittsburgh, when coupled with competition by a tax-exempt governmental parking operation (the Parking Authority) raises serious questions of due process and equal protection of the laws and requires, as the dissent states, "further analysis".

WHEREFORE, your petitioners respectfully pray this Honorable Court to grant the within Petition for Allowance of Appeal and to reverse the Order of the Commonwealth Court as being contrary to the equal protection and due process provisions of the Constitutions of the United States and Pennsylvania as well as contrary to the decisional law of this Commonwealth.

Respectfully submitted,

LEONARD BOREMAN,
RICHARD H. MARTIN,
BASKIN, BOREMAN, WILNER, SACHS,
GONDELMAN & CRAIG,

Attorneys for Petitioners.

Answer to Petition for Allowance of Appeal.

To the Honorable, the Judges of said Court:

COUNTER-STATEMENT OF FACTS

1. On December 31, 1969, the City of Pittsburgh, respondent herein, enacted Ordinance No. 704, the Parking Tax Ordinance, pursuant to authority granted by the Local Tax Enabling Act, Act No. 511 of 1965, December 31, P. L. 1257, 53 P. S. § 6901 *et seq.* Ordinance No. 704 is a substantial re-enactment of previous parking tax ordinances beginning with 1963; only the rate of tax, 20% on the gross receipts from nonresi-

dential parking transactions, distinguishes the contested Ordinance from the Ordinance of the prior year which levied the tax at a 15% rate.

2. Act 511 of 1965 contains a provision allowing 25 or more affected taxpayers to attack the "reasonableness" of any tax enacted under its authority within 30 days from the date of the passage of the tax ordinance. Pursuant to this section, Ordinance No. 704 could not take effect until February 1, 1970, a month after its passage.

3. On February 20, 1970, 12 corporate taxpayers who control the majority of parking places in downtown Pittsburgh filed a Complaint In Equity, grounding their attack upon the re-enacted Parking Tax Ordinance upon alleged violations of the federal and state constitutions in the areas of uniformity, discrimination and confiscation.

4. At a trial before the Honorable Arthur Wessel, Jr. of the Court of Common Pleas of Allegheny County on September 13 through 15, 1970, evidence was introduced to show the alleged confiscatory nature of the tax. On March 19, 1971, Judge Wessel issued a Decree *Nisi* in favor of respondent. Timely exceptions to the Decree *Nisi* were dismissed by the Court *en banc* on July 11, 1971, at which time a final decree was entered.

5. A timely appeal by petitioners to the Commonwealth Court of Pennsylvania was based on the same constitutional questions which had been before

the lower court. After argument on February 22, 1972, the appellate court issued an opinion, dated June 8, 1972, affirming the order of the court below.

6. Petitioners filed a Petition For Reargument in the Commonwealth Court of Pennsylvania which was granted by Order dated June 29, 1972, setting forth, in addition to the constitutional grounds, their contention that the tax is excessive and unreasonable and should be reduced or invalidated by the Commonwealth Court. Over the objections of respondent, the Court permitted petitioners to offer factual evidence in affidavit form to the effect that petitioners could not have complied with statutory requirements inasmuch as there were not 25 parking lot operators in the City affected by the tax. Respondent was forced to counter the objectionable evidence by producing an affidavit setting forth information that over 150 taxpayers are affected by Ordinance No. 704 of 1969.

7. Reargument was had in Commonwealth Court on September 11, 1972, and on October 11, 1972, the Court issued its decision, adhering to its prior position affirming the order of the court below.

8. On November 6, 1972, more than 30 days since the issuance of the final order and opinion of Commonwealth Court on June 8, 1972, no stay having been asked for or granted, petitioners filed the within Petition For Allowance Of Appeal.

QUESTIONS PRESENTED BY THE PETITION FOR ALLOWANCE OF APPEAL

1. Should an appeal be entertained on the insubstantial constitutional questions concerning the uniformity of the Parking Tax Ordinance and the reasonableness of the classification of parking lot operators?

(Answered in the negative in the Court below.)

2. Should this Honorable Court disturb the findings of the Trial Court, confirmed by the Court *en banc* and affirmed by the Comonwealth Court on two occasions, that the parking tax is not confiscatory?

(Answered in the negative by the Court below.)

3. Does this Honorable Court have jurisdiction to consider petitioners' claim that the Parking Tax Ordinance is excessive and unreasonable?

(Answered in the negative in the Court below.)

4. May petitioners raise a constitutional challenge to the Local Tax Enabling Act, which claim was not raised, tried or considered by the Trial Court or the Commonwealth Court?

(Not decided in the Court below.)

5. When petitioners have failed to present any proof of their contention that an unreasonably high rate of taxation prohibits private enterprise in favor of public control of the parking industry, may they now make a constitutional attack on the Parking Tax Ordinance on such ground?

(Not decided in the Court below.)

6. May petitioners appeal to the Supreme Court when they have failed to comply with the time limit requirements of the Appellate Court Jurisdiction Act?

(Not decided in the Court below.)

REASONS FOR DISALLOWANCE OF APPEAL

1. ***The within proceeding in equity does not involve substantial constitutional questions.*** The power of the City to impose parking taxes has been upheld by this Honorable Court on more than one occasion: *McGillick v. City of Pittsburgh*, 415 Pa. 581, 203 A. 2d 480 (1964); *University Club v. City of Pittsburgh*, 440 Pa. 562, 271 A. 2d 221 (1970). Not only were the uniformity of the tax and the reasonableness of its classifications questioned and affirmed in the cases cited *supra* but the Philadelphia Parking Tax Ordinance, which served as the model for the Pittsburgh Ordinance, also withstood similar constitutional challenges in *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940) and *Philadelphia v. Eglin's Garages, Inc.*, 342 Pa. 142, 19 A. 2d 845 (1941). As the Commonwealth Court noted in its Opinion, at p. 2 (Petitioner's Exhibit "A"):

> "The subject of municipal taxes upon the gross receipts of parking lot transactions has been the subject of considerable litigation. All save one of appellant's contentions here have been conclusively decided against them . . ."

There have been no innovations in statutory or case law to dilute the findings of this Court that parking lot operators form a reasonable classification. The "findings of fact of the Pennsylvania Legislature"[1] to which petitioners allude have no bearing on

[1] Petitioners' Petition, p. 3.

the taxability of parking lot operators as a class; they are part of an act governing another group, parking authorities, and petitioners are not controlled or regulated under that Act. The fact that parking authorities are also members of the class of parking lot operators merely serves to make such authorities taxable, not to remove petitioners from the purview of a valid classification. *McGillick v. City of Pittsburgh, supra.*

2. *The findings of the Trial Court, Court en banc and the Commonwealth Court that petitioners' constitutional attack on the basis of confiscation is likewise insubstantial should not be disturbed.* Petitioners bear a heavy burden when attempting to establish confiscation. As this Honorable Court indicated in the *Samuels* Case, *supra*, at p. 327, ". . . if an occasional operator cannot afford to continue in business and pay the tax, it may be unfortunate, but will not render the Ordinance invalid." Petitioners did not show that an entire industry had been driven to the wall or that they themselves were out of business. Statistics compiled by a non-expert from a non-comprehensive survey of petitioners' books and records omitted figures showing petitioners' net profit or net loss from parking operations or revenues from allied businesses operated by petitioners upon their lots, such as stores and office buildings. Where petitioners' evidence revealed only the experience of downtown parking lot operations, excluding their own experiences in other areas of the City, State and country; and where petitioners represent only twelve of over one

hundred fifty licensed parking lot operators and are, for the most part, controlled or owned by one person, the conclusion is inescapable that a *substantial* question of confiscation affecting an entire industry has not been raised. The evidence has been examined on four separate occasions, in trial court, by the court *en banc*, by the Commonwealth Court, and again by the Commonwealth Court on rehearing, and has been rejected as insufficient to meet petitioners' heavy burden.

Furthermore, petitioners did not meet the criteria set forth in *Philadelphia v. Eglin's Garages, Inc., supra*, at p. 144 in respect to setting forth the type of proof which could sustain a finding in their favor. The review by the Commonwealth Court of the evidence presented at the trial shows that the Findings of Fact of the lower court were supported by the record. Such Findings of Fact are controlling on appeal in the absence of manifest error, especially if they are approved by a court *en banc*. *Navios Corp. v. National Maritime Union of America*, 402 Pa. 325, 166 A. 2d 625 (1961), Cert. Denied 81 S. Ct. 1047 (two cases), 366 U. S. 905, reh. den. 81 S. Ct. 1658, 366 U. S. 941.

3. *This Honorable Court lacks jurisdiction to consider petitioners' claim that the Parking Tax Ordinance is excessive and unreasonable.* Review is limited to the questions properly raised by the Record. *McCahill v. Roberts*, 421 Pa. 233, 219 A. 2d 306 (1966). Although the thrust of the Complaint filed in Equity was to constitutional questions, the Commonwealth

Court, on review, found that the increase of 5% in the Parking Tax of the City of Pittsburgh over the prior year was "unreasonable". The Court correctly held, however, that the reasonableness of the rate of a tax imposed pursuant to the Local Tax Enabling Act cannot be attacked other than in accordance with the procedure provided by Section 6 of the Local Tax Enabling Act, Act of December 31, 1965, P. L. 1257, 53 P. S. 6906. That Section provides an *exclusive* remedy for taxpayers who wish to assert that a tax imposed by the Act is excessive or unreasonable.[2] The time limitation expressed in that Section is a substantive time limitation, and no cause of action exists once that 30-day period has elapsed.

The reason for the 30-day limitation prescribed by the Enabling Act is apparent on the face of the legislation. Political subdivision levying taxes under the Act and adopting budgets in reliance on such taxes must be in a position to know within a short time following enactment of a tax whether or not the rate imposed by the tax will be conditionally modified or strengthened. After expiration of 30 days the Legislature intended to provide assurance to the political subdivision that it could collect the tax without regard to the unreasonableness or excessiveness of the tax imposed. That is why no tax levied pursuant to the Act becomes effective until such 30-day period has expired.

> "No tax levied for the first time by any political subdivision to which this Act applies shall

go into effect until thirty days from the time of the adoption of the ordinance or resolution levying the tax. Within said thirty days, taxpayers representing twenty-five percent or more of the total valuation of real estate in a political subdivision as assessed for taxation purposes, or taxpayers of the political subdivision, not less than 25 in number, aggrieved by the ordinance or resolution, shall have the right to appeal therefrom . . .

"It shall be the duty of the Court to declare the ordinance and the tax imposed thereby to be valid unless it concludes that the ordinance is unlawful or finds the tax imposed is excessive or unreasonable; but the Court shall not interfere with the reasonable discretion of the legislative body in selecting the subjects or fixing the rates of the tax . . . ."

Petitioners argue, without authority, that, so long as an equity suit is filed contesting the constitutionality of the said tax, the court can always consider the reasonableness of the rate of a tax enacted pursuant to the Local Tax Enabling Act as pendent to its equity jurisdiction. This position is completely contrary to case law. In *Lynch v. Owen J. Roberts School District*, 430 Pa. 461, 244 A. 2d 1 (1968), where the Court agreed to treat the statutory issue of reasonableness in conjunction with the constitutional challenge in the suit in equity, the action had been filed within the 30-day period allowed by the Act, and so the statutory cause

of action was still viable. All *Lynch* says is that Section 6 was not the exclusive remedy for taxpayers who wished to test the *validity* of a tax. In the case at bar, however, the 30-day period ended January 30, 1970. Petitioners filed neither the statutory action *nor this suit in equity* until February 20, 1970, 21 days after the prescribed period for the taxpayers' statutory cause of action had expired!

Furthermore, even if petitioners had filed within the required time, their constitutional challenge is too insubstantial to support pendent jurisdiction. As this Court said in *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 430 Pa. 550, 244 A. 2d 10 (1968): [f.n.] As stated in *Campbell v. Coatesville Area School District*, 440 Pa. 496, 500, 270 A. 2d 385 (1970):

> "The thrust of *Crosson* is that, if the non-constitutional challenge to the assessment could not have been maintained in a separate action in equity on the assessment, it cannot be advanced in an attack on the tax resolution which was based on the assessment."

The above is in further explanation of *Crosson v. Downington Area School District*, 440 Pa. 468, 270 A. 2d 377 (1970) which states at p. 474:

> "Which *Lynch* demonstrates that a court of equity would determine non-constitutional challenges to a tax resolution even though the constitutional

f.n.—p. 556—

"Since plaintiff's requests for equitable relief were denied, equity actually does not have what is sometimes called 'retained jurisdiction' to grant incidental legal relief."

challenge affording jurisdiction and competency is not considered, it does not necessarily follow that equity will consider *every* non-constitutional challenge that is collateral to the taxing resolution."

It would appear that the consideration of the reasonableness of the rate of a tax enacted pursuant to a Local Tax Enabling Act is *beyond the jurisdiction of any court* after expiration of the time stipulated by the Act for judicial review. As this Court held in *Nardo v. Smith*, 448 Pa. 38, 39, 292 A. 2d 377 (1972):

"Where an act of assembly fixes the time within which an appeal may be taken, the time may not be extended as a matter of indulgence."

4. *Petitioners are precluded from raising a constitutional challenge to the Local Tax Enabling Act where it was not raised, tried or considered by the trial court or the Commonwealth Court.* Paragraph 6 (d) in the Petition For Allowance Of Appeal introduces a question of the constitutionality of Section 6 of the Local Tax Enabling Act. Although petitioners claim an answer by the Commonwealth Court in the negative, that Answer must be assumed from Commonwealth Court's silence on the subject of the constitutionality of Section 6 of the Local Tax Enabling Act since the record and briefs are devoid of any mention of the issue.

Prior to petitioning for Reargument in Commonwealth Court, at which time petitioners filed an Affidavit with Court stating that to their knowledge there

were not 25 aggrieved taxpayers in the City of Pittsburgh available to file a statutory appeal, there was no mention of Section 6 in the pleadings or at trial. Although respondent was severly prejudiced by the introduced of a new theory at so late a date, it managed to file an Affidavit by the City Treasurer that, at the time of the enactment of the Parking Tax, there were 156 taxpayers paying it. At no time in their briefs or in their Argument to the Commonwealth Court did petitioners raise any challenge to the validity of Section 6 of the Tax Enabling Act.

While seeking to show impossibility of compliance with Section 6 (a position Commonwealth Court could not accept in the face of the Treasurer's Affidavit), petitioners failed to explain why the affidavit was not filed within the statutory 30-day period. They also failed to raise any question concerning the alleged discrimination which they *now* say denies "substantial taxpayers" the right to file a statutory appeal without the necessity of soliciting 15 or other operators to participate in the litigation.

It is well recognized that questions and issues not raised in a lower court will not be considered on appeal. *Division 85, Amalgated Transit Union v. Port Authority of Allegheny County*, 417 Pa. 299, 208 A. 2d 271 (1965); *In Re Salisbury Twp.*, 172 Pa. Super. 262, 94 A. 2d 143 (1953). As this Honorable Court stated in its *Per curiam* Opinion in *Clarion Borough Petition*, 275 Pa. 175, 118 A. 2d 765 (1922), shown here in its entirety:

> "This is an appeal from the Superior Court, allowed because a constitutional question was alleged to be involved; but the record shows no such point presented to that tribunal. Neither the statement of questions involved, the assignment of error in, nor the opinion of, the Superior Court mentions, or indicates, a constitutional point. Under such circumstances appellants have no standing to be heard in this Court: Chartiers Creek Bridge, 235 Pa. 365."

See also, *Wynnewood Civic Association v. Board of Adjustment of Lower Merion Township*, 406 Pa. 413, 179 A. 2d 649 (1962). In addition, the constitutional claim which petitioners attempt to raise herewith for the first time is totally without merit inasmuch as § 6 of Act 511 provides for suit either by 25 aggrieved parties or by a taxpayer who pays a certain percentage of the City's assessed valuation.

5. *The petitioners' failure to present evidence in the lower court on the issue of public control of the parking industry is fatal to its contention concerning the rate of taxation.* Since the issues of "confiscation" and "excessiveness" are two entirely separate questions, they require entirely separate proofs. Statistical evidence produced by petitioners in the lower court, was, according to petitioners' own counsel, an effort to demonstrate that the tax was confiscatory, not that it was excessive. As suggested by the opinion filed by the Commonwealth Court in this case, an excessiveness or unreasonableness question involves the need of a municipality for the revenue derived from the

tax. Although the respondent met and refuted petitioners' evidence regarding confiscation, nothing in the pleading alerted respondent to produce a defense based on the *rate* of the tax, rather than its effect. *A fortiori*, respondent would be severely prejudiced at this late date if the Court would allow an appeal in respect to a question which was neither presented nor developed at the trial level. Generally, a court will not consider a case on a theory different from that raised in a lower court, especially where prejudice would result from a change of theory on appeal. *Wiggins v. Philadelphia*, 331 F. 2d 521 (1964).

Petitioners' attempt to introduce an extraneous issue regarding "public control" of a private industry at this stage of proceedings is unprecedented but it is recognizable as just one more volley in the all-out war of petitioners against a legal tax. It is interesting to note that while petitioners condemn respondent herein on competition they suffer from the Pittsburgh Parking Authority, an agency of the Commonwealth, they have themselves initiated litigation in the Court of Common Pleas of Allegheny County under the caption *Public Parking Authority et al. v. City of Pittsburgh*, No. 687 July Term 1972,[3] to remove the Parking Authority from the ambit of the Pittsburgh Parking Tax.

[3] The litigation involves four plaintiffs in addition to the Parking Authority, who operate six Parking Authority garages, three of which are leased by Parking Service Corporation, which is a petitioner in this case. Parking Service Corporation is owned and controlled by John Stabile, who also represents seven of the twelve appellants in the case at bar. The Parking Authority was joined by the other appellants as a party plaintiff without its permission. The right of the Public Parking Authority of Pittsburgh to be made a plaintiff without its consent was specifically questioned before the Common Pleas Court and a decision rendered, holding that the Parking Authority in effect is a proper involuntary plaintiff.

If successful, petitioners will have *increased* the competition of the Parking Authority with private industry.

Respondent respectfully submits that the issues in the within case have been heard and tried on four different occasions. The cause of justice has been served and no public policy requires this Honorable Court to devote attention to theories different from those advanced at trial and in the intermediate appellate court. *Moffitt v. Pennsylvania Manufacturers Ass'n. Casualty Insurance Company*, 137 Pa. Super. 569, 10 A. 2d 579 (1940); *Temple University v. Zoning Board of Adjustment of Cheltenham Twp.*, 414 Pa. 191, 199 A. 2d 415 (1964).

6. *The Petition For Allowance Of Appeal should be denied as untimely.* The order of the Commonwealth Court affirming the order of the Court of Common Pleas was dated June 8, 1972. The instant Petition for Allowance of Appeal was not filed until November 6, 1972, almost five months later. The petition is untimely and thus should be denied.[4]

The time for taking appellate action is set at thirty days under § 502 of the Appellate Court Jurisdiction

[4] The rules of this Honorable Court do not specifically provide for motions to quash petitions for allowance of appeal. Rule 24(2) of the Supreme Court of the United States provides:

"No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor."

By analogy, respondent is here objecting to the timeliness in the answer to the petition.

Act of July 31, 1970, P. L. ____, No. 223, 17 P. S. § 211. 502.[5]

Numerous decisions of this and the other appellate courts of the Commonwealth have held that a court is without jurisdiction to entertain an appeal where the time requirements have not been followed. Most recently, in quashing an appeal filed only one day beyond the statutorily prescribed thirty-day time limit, this Court held in *Nardo v. Smith, supra,* at 39:

> "Where an act of assembly fixes the time within which an appeal may be taken, the time may not be extended as a matter of indulgence."

This Court dealt at length with this question in *Commonwealth v. Bey,* 437 Pa. 134, 262 A. 2d 144 (1970). There the relevant statute provided for an appeal to the Supreme Court within thirty days from the date on which the order was issued. Forty-two days after the order from which he sought to appeal was issued, the District Attorney of Allegheny County filed an appeal and a petition requesting the Court to permit an appeal *nunc pro tunc.* In quashing the appeal and denying leave to file an appeal *nunc pro tunc,* this Court stated at pages 138-139:

> "*This appeal was filed twelve days beyond the statutorily-prescribed time for taking an appeal.* The timeliness of an appeal and compliance with the statutory provisions which grant the right of

[5] This section replaced the former forty-five day period provided in § 4 of the Act of May 19, 1897, P. L. 67, as amended, 12 P. S. 1136, which was repealed by § 509 (a) (2) of the Appellate Court Jurisdiction Act, 17 P. S. § 211.509(a) (2).

appeal go to the jurisdiction of our Court and its competency to act. See: Commonwealth v. Yorktowne Paper Mills, Inc., 419 Pa. 363, 368, 214 A. 2d 203 (1965). We are without the power to enlarge or extend the time provided by statute for taking an appeal or to grant leave to file an appeal *nunc pro tunc*. See: Commonwealth v. Simon, 413 Pa. 609, 610-11, 198 A. 2d 583 (1964); Commonwealth v. Mackley, 380 Pa. 70, 73, 110 A. 2d 172 (1955). See also 4 Am. Jur. 2d Appeal and Error §§ 292,293 (1962); 9 Standard Pennsylvania Practice (Rev'd) § 25 (1962). Neither the parties, by agreement, nor the Court, by acquiescence, can extend its jurisdiction.

* * *

Under the present circumstances, we have no authority to permit this appeal or to grant an appeal *nunc pro tunc* in violation of the statute through which, and only through which, the jurisdiction of our Court attaches." (Emphasis in original)

See also *Luckenbach v. Luckenbach*, 443 Pa. 417, 281 A. 2d 169 (1971); *Washington Mall v. Bd Assess & Rev.*, 4 Commonwealth Ct. 251, 285 A. 2d 885 (1971); *Big Bear O. C. v. Zon. Bd. A. Greenville*, 2 Commonwealth Ct. 33, 277 A. 2d 166 (1971).

Since this petition for appeal was filed long after the statutory time had expired, it should be denied as untimely.

The situation is not altered by the fact that the present petitioners filed a petition for reargument in

the Commonwealth Court, which petition was granted. The law is clear that the time for appealing is not extended by the making or granting of an application for reargument or rehearing unless the court stays proceedings. *Francis v. J. A. Brashear M. Sch. D.*, 435 Pa. 589, 258 A. 2d 509 (1969); *Smith v. Jones*, 369 Pa. 13, 85 A. 2d 23 (1951); *Erie v. Piece of Land*, 341 Pa. 310, 17 A. 2d 399 (1941); *Henry's Estate*, 290 Pa. 537, 139 A. 198 (1927); *Ifft v. Hunter*, 202 Pa. Superior Ct. 487, 198 A. 2d 436 (1964); 9 *Standard Pennsylvania Practice* 208; 2 P. L. E. *Appeals*, §§ 187, 188.

Francis v. J. A. Brashear M. Sch., D., supra, is on all fours with the instant case. The entire opinion of this Honorable Court reads as follows:

"*OPINION PER CURIAM*, November 1, 1969:

This is an action in mandamus.

On March 3, 1966, the court below entered judgment for the defendant on the pleadings. On March 17th, a petition for reargument was filed which was granted on April 7th. No stay of the proceedings was requested or directed. On February 6, 1969, the court reaffirmed the judgment entered on March 3, 1966. [Footnote omitted] The present appeal was filed on February 26, 1969.

Unfortunately for the appellant, the appeal is untimely and must be quashed. The judgment entered on March 3, 1966, was a final judgment, and the statutory period for appeal began to run immediately. Absent an order staying the proceedings, the granting of reargument did not open the

judgment or otherwise result in extending the time for appeal fixed by statute. Erie v. Piece of Land, 341 Pa. 310, 17 A. 2d 399 (1941).

Appeal quashed."

The same situation obtained in *Smith v. Jones, supra.* There the appeal was from an order discharging a motion for judgment on the pleadings. The motion was discharged on June 21, 1951, but the appeal was not entered until October 16, 1951, after the three-month time period provided in § 4 of the Act of 1897 had expired. The appellant contended that the appeal period ran not from June 21, 1951, but from October 4, 1951. On July 25, 1951, the lower court had, like the Commonwealth Court here, granted reargument but without a stay of proceedings. On October 4, 1951, the lower court entered an order stating that having reconsidered the motion on briefs, it saw no reason for reversing its previous order and therefore confirmed the order as of the original date. Similarly, the Commonwealth Court here stated (Exhibit C to Petition, P.2) that it adhered to its original decision of June 8, 1972.

Smith v. Jones, supra, was followed in *Ifft v. Hunter, supra.* The proceedings began with a petition to open a judgment quieting title. On October 30, 1962, the rule was discharged, but on November 30, 1962, the court ordered that the matter be reargued. No stay of the proceedings was granted. On June 6, 1963, the order of October 30, 1962, was reaffirmed. The appeal to the Superior Court was filed on June 25, 1963, within three months of the June 6, 1963 order but more than three months from the October 30, 1962

order. The Court quashed the appeal as untimely, stating:

> "A petition for reargument and proceedings thereunder do not operate to arrest the running of the time limit for appeal unless a stay of proceedings is granted."

Since the instant petition is untimely, it should be denied.

Respondent questions the sincerity of these repeated attacks on the City of Pittsburgh Parking Tax in view of the numerous cases which have upheld its validity over the past decade. Petitioners seek, not just their day in court, but their year or two before the bar.

WHEREFORE, respondent respectfully prays this Honorable Court to dismiss the Petition For Allowance of Appeal and to affirm the Order of the Commonwealth Court.

Respectfully submitted,

GRACE S. HARRIS,
Special Assistant City Solicitor,

EUGENE B. STRASSBURGER, III,
Executive Assistant City Solicitor,

RALPH LYNCH, JR.,
City Solicitor, City of Pittsburgh.

Reply to Answer of the City of Pittsburgh to Petition for Allowance of Appeal.

To the Honorable, the Judges of said Court:

1. Petitioners, Alco Parking Corporation, *et al.*, filed their Petition for Allowance of Appeal on November 6, 1972.

2. The City of Pittsburgh ("Respondent") filed an Answer to Petition for Allowance of Appeal stating its position regarding the allowance of the appeal by this Honorable Court.

3. The Answer of Respondent is replete with error and misstatement of facts, requiring the within reply on behalf of petitioners, as a more particularly set forth below:

A. The Respondent's position that "the within proceeding in equity does not involve substantial constitutional questions" is absurd in view of the four-to-three split on the subject by the Commonwealth Court in the instant case as well as the recent decision by the Court of Common Pleas of Allegheny County, sitting *en banc*, in *Public Parking Authority, et al., v. City of Pittsburgh*, at No. 687 July Term, 1972, wherein the Court held that the Public Parking Authority is exempt from taxation since its parking garages constitute "public property used for public purposes". (A true Copy of said opinion is attached hereto, made a part hereof and marked Exhibit "A".)

The arguments relating to the various constitutional issues raised in and by the courts below, including the argument stressed by the dissenters in the Commonwealth Court to the effect that due process and equal protection may be violated where the tax falls unequally on enterprises in an industry consisting of both public and private entities, are stated in the various briefs of petitioners filed herein.

The decision by the Court *en banc* in *Public Parking Authority, et al. v. City of Pittsburgh, supra,* raised substantially the same constitutional issue raised in McGillick v. City of Pittsburgh, 415 Pa. 581, 203 A. 2d 480 (1964), wherein it was decided by the Court of Common Pleas of Allegheny County and affirmed, *per curiam,* by this Honorable Court that the parking tax is unconstitutional because it lacks uniformity if it excludes from its coverage the Public Parking Authority. Since the Court of Common Pleas, in *Public Parking Authority v. City of Pittsburgh, supra,* has now applied *County of Allegheny v. Moon Township,* 436 Pa. 54, 258 A. 2d 630 (1969) to bar any parking tax coverage on the Public Parking Authority, the same situation exists now as in *McGillick* and, at the very least, raises a substantial constitutional question worthy of review by this Honorable Court. The issues of uniformity, equal protection and due process under both the United States Constitution and that of the Commonwealth of Pennsylvania have been raised herein, and it would be both appropriate and expedient for this Court to decide these issues herein.

Moreover, the existence of these constitutional issues confers jurisdiction upon this Court to decide any non-constitutional issues raised herein, despite the existence of a specific statutory remedy. This argument is fully briefed in Petitioner's Supplemental Brief at pages 2 through 8.

B. Neither the trial court, Court *en banc* nor the Commonwealth Court found that the petitioners' constitutional attack on the basis of confiscation to be "insubstantial" as claimed by the Respondent. In fact, contrary to the statements of the Respondent in its Answer, the trial court, *Court en banc,* and Commonwealth Court accepted the expertise of Donald M. McNeil without question and found the computations and survey prepared under his direction to be both competent and accurate. In its Opinion of June 8, 1972, Commonwealth Court Judge Rodgers stated as follows:

> "The *undisputed evidence* on this record is as follows:
>
> 2. Based upon six months' operations and a sound statistical projection for the balance of the year 1970 with expenses computed at 1969 rates, that portion of the industry represented by appellants, would, during the year 1970, earn gross revenues of over $8,000,00, pay $1,600,000 on account of this tax and sustain a loss of $270,000. Of the fourteen appellant enterprises nine would sustain losses and of the others the one showing

the largest profit would earn an amount equal to only 2.9% of its gross revenues.

3. The appellants are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher rates but also because the appellants are in competition with a public authority which, exempt from other taxes, can charge less."[1]

The position of the petitioners has not been rejected in the various courts below because of its insubstantiality of lack of evidence, as the Assistant City Solicitor urges, but only because the Commonwealth Court rejected petitioner's argument that there was a constitutional prohibition against taxation at unreasonable or confiscatory rates.

C. This Court has jurisdiction to consider petitioners' constitutional and non-constitutional claims raised in the instant equity action as well as to formulate an adequate and appropriate remedy. *Lynch v. Owen J. Roberts School District*, 430 Pa. 461, 244 A. 2d 1 (1968). As argued more fully in petitioners' Supplemental Brief, this Court may act in this case despite the existence of a statutory remedy. Said statutory remedy may be *exclusive* where the taxpayers wish to challenge only the amount of the tax or its rate, but said remedy has never been held to be exclusive where the validity of the local tax is questioned based on

[1] As stated above, the Public Parking Authority of Pittsburgh is now exempt from the parking tax as well as on the basis of *Public Parking Authority v. City of Pittsburgh, supra.*

constitutional grounds. *Pgh. Public Parking Authority v. Bd. of Property Assessment, etc.*, 377 Pa. 274, 105 A. 2d 165 (1954) and cases cited therein.

Moreover, petitioners contend that Section 6 of the Local Tax Enabling Act, 53 P. S. § 6906, which respondent asserts is that exclusive procedural vehicle for petitioners, violates equal protection and due process where a substantial portion of the parking industry would be denied access to the courts thereby. This contention is fully briefed in Petitioners' Supplemental Brief. However, respondent in its Answer makes several misstatements of fact in this connection. First, the respondent states, on pages 3 and 11 of its Answer, that the Court

> "permitted petitioners to offer factual evidence in affidavit form to the effect that petitioners could not have complied with the statutory requirement . . .".

Petitioners did not offer nor any court receive such an affidavit as stated by the respondent. Second, the respondent indicates that it "was forced to counter the objectionable evidence by producing an affidavit" setting forth contrary information. This statement is likewise not true since no such affidavit was accepted into the record in this case to the knowledge or belief of your petitioners. The position of the petitioners is set forth in its brief and any contention not covered therein was not asserted by petitioners at oral argument below.

D. The respondent also contends that the challenge to the constitutionality of the Local Tax Enabling Act, Section 6, cannot be raised at this time since the issue was not raised in the trial court or the Commonwealth Court. The respondent's position lacks merit if examined in the circumstances of this case. The respondent raised no objections to petitioners' complaint in equity or at trial based on the failure of petitioners to utilize the Local Tax Enabling Act's statutory appeal procedure. All parties proceeded on the basis that equity was the proper forum to decide all issues raised in the complaint. It was not until the Commonwealth Court ruled that, even though the rate of taxation was unreasonable, no relief could be given except in proceedings instituted under Section 6 of the Local Tax Enabling Act. Thus, it was the Commonwealth Court which inserted into the case possible issues relating to said Act and, petitioners contend, it would be patently unfair to sustain objections to their attack on that Act on appeal to this Court.

E. The respondent contends in its Answer that "nothing in the pleading (complaint in equity) alerted respondent to produce a defense based on the *rate* of the tax, rather than its effect". The absurdity of this position is clear upon examination of the pleadings herein. Moreover, Petitioners' Exhibit "1", as well as other exhibits in the record, indicate the care with which your petitioners constructed the proof regarding the rate structure of the tax in both public and private sectors of the parking industry.

F. Petitioners have filed a timely Petition for Allocatur in this matter. Said petition was filed within thirty (30) days of the final Order of the Commonwealth Court after reargument.

When reargument was granted in this case, the thirty (30) day appeal period which began on June 8, 1972, had not yet run. Counsel for petitioners telephoned the Prothonotary of the Supreme Court, Patrick Bolsinger, Esquire, and specifically requested instructions regarding the procedure to be followed in these circumstances. Mr. Bolsinger indicated to Leonard Boreman, Esquire, that it was not necessary for petitioners to file their petition for allocatur until after reargument had been disposed of, since reargument had been granted. In reliance on Mr. Bolsinger's representation, the Petition for Allocatur was, therefore, filed within thirty (30) days of the Final Order of the Commonwealth Court, which was October 10, 1972.

Respondent cites several cases to support the position that petitioners are barred from filing their Petition for Allowance of Appeal within thirty (30) days after final Order of the Commonwealth Court after reargument, rather than within thirty (30) days of the date of the original Order of the Commonwealth Court since no stay of said Order was requested. The cases relied on by respondent deal with the previous *statutory* time limit for appeal directly to this Court and hold that such statutory time limit is substantive

in nature and is the basis of jurisdiction in the Appellate Court to entertain the appeal. These cases would appear to be inapplicable to the present case in that the relevant time limit for a Petition for Allowance of Appeal (as distinguished from a direct appeal) is not statutory in nature and therefore not substantive.

Respectfully submitted,

LEONARD BOREMAN,
RICHARD H. MARTIN,
BASKIN, BOREMAN, WILNER, SACHS,
GONDELMAN & CRAIG,
Attorneys for Petitioners.

"EXHIBIT "A".

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

PUBLIC PARKING AUTHORITY OF PITTSBURGH, a municipal corporation, ASSOCIATED DRY GOODS CORPORATION, a Virginia corporation, successor to JOSEPH HORNE CO., a Pennsylvania corporation, GIMBEL BROTHERS, INC., a New York corporation, THE MAY DEPARTMENT STORES COMPANY, a New York corporation, and PARKING SERVICE CORPORATION, a Pennsylvania corporation, *Plaintiffs,* v. CITY OF PITTSBURGH, a municipal corporation, *Defendant.*	No. 687 July Term, 1972.

BEFORE: LEWIS, SILVESTRI and DAUER.

OPINION.

SILVESTRI, *J.*

The plaintiffs filed a complaint in equity seeking to enjoin the City of Pittsburgh, herein City, from enforcing the provisions of Ordinance No. 704, being The Parking Tax Ordinance as to them and to order a refund of the taxes paid by the lessee-plaintiffs for the years 1970 and 1971, pursuant to said Ordinance, contending that the parking garages and lots owned and operated by the Authority are exempt from all taxation pursuant to the Parking Authority Law and that the tax imposed by the Ordinance is illegal, improper and unjust and in violation of Article VIII, Section 2(a), Subsection (iii) of the Constitution of Pennsylvania as well as the Parking Authority Law and the statutes of the Commonwealth of Pennsylvania in that it is a tax imposed on public property used for public purposes.

The defendant, City, filed its answer admitting all the averments of fact of the complaint and thereupon the plaintiffs moved for summary judgment which is before us for disposition. From the complaint, answer thereto and the affidavit of the plaintiff the following facts are not in dispute.

The plaintiffs, Associated Dry Goods Corporation, Gimbel Brothers, Inc., The May Department Stores Company and Parking Services Corporation, herein referred to collectively as lessee-plaintiffs, are operators under leases of various parking garages and lots

owned by the plaintiff, Public Parking Authority of Pittsburgh, herein Authority.[1]

The lease[2] of each lessee-plaintiff contained a clause, substantially the same, as follows:

> TAXES "[lessee] will pay promptly all taxes assessed against it on account of its interest in or operations of or upon the demised premises, provided, however, that nothing contained in this section shall require [lessee] to pay any such taxes so long as it shall in good faith contest the validity thereof. [Lessee] shall have the right to contest such taxes either in its own name or in the name of the Authority as may be appropriate. [Lessee] agrees to save the Authority harmless from any and all claims, demands or liens on account of, or arising out of any of the aforesaid tax liabilities."

---

[1] Leases

Lessee	*Location*	*Date*
Associated Dry Goods Corporation—Joseph Horne Co.	Sixth Street and Fort Duquesne Blvd.	12/1/66
Gimbel Brothers Inc.	Smithfield Street and Liberty Ave.	4/1/64
The May Department Stores Company	Fifth Ave. at Cherry Way; Boulevard of the Allies and Cherry Way	10/1/54
Parking Service Corporation	Ninth Ave. and Penn Ave.; Bigelow Blvd.; Third Ave.	1/1/69

[2] The leases are not attached to the Complaint by reason of being cumbersome but are made part of the record by the affidavit in support of the plaintiffs' motion for summary judgment.

The Public Parking Authority of Pittsburgh is a corporation organized and existing pursuant to the Parking Authority Law, Act June 5, 1947, P. L. 458, Section 1 *et seq.*, as amended, 53 P. S. 341, *et seq.*

The City, pursuant to "The Local Tax Enabling Act", Act No. 511, 1965, Dec. 31, P. L. 1257, Section 1 *et seq.* as amended, 53 P. S. 6901, *et seq.*, enacted Ordinance 704, entitled "Parking Tax Ordinance", effective Feb. 1, 1970.

The Ordinance provides, as herein relevant, as follows:

> Section 2 *Definition*: (e) *Operator*—"any person conducting the operation of a parking place or receiving the consideration for the parking or storage of motor vehicles at such parking place; the term does not include the City but does include the Public Parking Authority of the City of Pittsburgh and does include operators on premises of Public Parking Authority of the City of Pittsburgh and non profit corporations which store or park vehicles for a consideration."
>
> Section 3 *Imposition of Tax*: "A tax—is hereby imposed upon all transactions of each operator with respect to each non-residential parking place, at the rate of 20 per centum (20%) of the gross receipts from all such transactions during the year 1970, and thereafter—"

The lessee-plaintiffs have paid the taxes imposed by the Ordinance for the years 1970 and 1971[3] and have demanded a refund thereof from the City which has been refused.

The question raised by this case is whether or not the Public Parking Authority of Pittsburgh and those who operate its facilities are exempt from payment of the tax imposed by the Parking Tax Ordinance.

Although the Parking Authority Law has given rise to much litigation, the precise question herein involved has never been squarely before the Court. However, from past litigation and from the Act itself certain characteristics of Authorities created under the Parking Authority Law, as are herein pertinent, have been firmly established; *i.e.*, the purposes of Parking Authorities are public uses for which public money

---

[3] Parking Tax Payments Since April 1, 1970 by Lessee-Plaintiffs

Lessee-Plaintiff	*Tax Year 1970*	*Tax Year 1971*	*Total*
Associated Dry Goods Corporation—Joseph Horne Co.	$127,185.54	$112,631.20	$263,409.70*
Gimble Brothers, Inc.	98,057.10	105,978.38	204,035.48
The May Department Store Company	198,941.00	195,192.00	394,133.00
Parking Service Corporation			
Bigelow Blvd.	82,146.17	42,892.48	
Third Ave.	92,160.98	48,340.34	
9th and Penn	70,852.21	54,952.76	
	245,159.36	146,185.58	391,344.94

* This total does not correspond with the amount for each year. However, the amounts for each year and the total are as they appear in the Complaint.

may be spent, Parking Authority Law, *supra*, Sections 1 and 2; the properties of Parking Authorities are public property and when used for the purposes contained in the Act, the public nature of such uses is conclusively determined, *McSorley v. Fitzgerald*, 359 Pa. 264, 59 A. 2d 142 (1948); *Pgh. Pub. Parking Aut. v. Bd. Property Assessors*, 377 Pa. 274, 105 A. 2d 165 (1954); an Authority existing by virtue of the Parking Authority Law and pursuing the purposes thereunder are public in nature and its facilities whether operated by the Authority or leased to private parties are public property. *Pgh. Public Parking Auth. Petition*, 366 Pa. 10, 76 A. 2d 620 (1950); *Midtown Motors v. Public Parking Authority of Pgh.*, 372 Pa. 475, 94 A. 2d 572 (1953); *Pgh. Pub. Parking Auth. v. Bd. of Prop. Assessors, supra; Price v. Phila. Park. Auth.*, 422 Pa. 317, 221 A. 2d 138 (1966).

It is thus clear that the property of an Authority incorporated under the Parking Authority Law and in pursuit of the purposes therein is public property; and the property or facilities of such an Authority does not lose their public nature where they are leased to private parties who operate them for private profit.

The Constitution of Pennsylvania, as amended, Article VIII, Section 2, provides as follows:

> "(a) The General Assembly may by law exempt from taxation:
>
> (iii) That portion of public property which is actually and regularly used for public purposes."

Our Constitution does not create exemptions, but it authorizes the General Assembly to grant exemptions. The first section of the taxation and finance article of our Constitution, providing that the General Assembly may, by general laws, exempt from taxation various enumerated properties, exempts nothing, but merely permits the General Assembly to grant exemptions within the lines laid down for its guidance. However, generally, and in the absence of express statutory authority, public property devoted to public use is not subject to taxation, and no express exemption is necessary. *Fidelity-Phila. Trust Co. v. Hines*, 337 Pa. 48, 10 A. 2d 553 (1940); *Pittsburg v. Sterrett Subdistrict School*, 204 Pa. 635, 54 A. 463 (1903); *Directors of the Poor of Schuylkill County v. School Directors of North Manheim Township*, 42 Pa. 21 (1862); *Robb v. City of Phila.*, 25 Pa. Super. 343 (1904); *City of Reading v. Berks County*, 22 Pa. Super. 373 (1903).

The General Assembly did include in The Parking Authority Law, *supra*, Section 6, the following exemption from taxes:

> ". . ., such Authorities shall not be required to pay any taxes or assessments upon any property acquired or used by them for such purposes . . ."

The foregoing exemption is merely a codification of the existing law as it applies to public property.

There is no question that the real estate or real property of such Authorities is exempt from taxation and this exemption applies even though the real estate

or real property is leased to or operated by private parties for private profit. *Pgh. Pub. Parking Auth. v. Bd. Prop. Assess., supra.*

The City contends that the Public Parking Authority of Pittsburgh and its lessees are subject to the tax imposed by the Parking Ordinance Tax and relies on *C. A. McGillick et al. v. The City of Pittsburgh,* 85 January Term, 1963, Miscellaneous Docket[4] affirmed *Per Curiam,* without opinion, 415 Pa. 581, 203 A. 2d 480 (1964), whereas plaintiffs rely for exemption from said tax on *Allegheny County v. Moon Twp.,* 436 Pa. 54, 258 A. 2d 630 (1969).

The *McGillick* case, was an appeal[5] by way of a case stated, challenging the validity of the Parking Tax Ordinance of the City of Pittsburgh, being Ordinance 434 of 1962, effective Feb. 1, 1963, on the grounds that it violated the uniformity clause of Article IX, Section 1 of the Constitution of Pennsylvania.[6] The Ordinance imposed a tax upon all transactions of each operator with respect to each commercial parking place. The Ordinance defined "commercial parking place" and excluded therefrom parking areas of hotels, tourists courts, trailer parks and parking areas provided or leased to occupants of residence for use only in connection with the occupancy of such residence.

[4] In the then Court of Quarter Sessions of Allegheny County, Pa.

[5] The appeal was taken pursuant to the Act of 1947, 53 P. S. 6853, known as the Stonier-Brunner Act.

[6] The other questions raised and disposed of by the Court in the appeal are not herein relevant.

The Ordinance also defined the word "operator" and excluded therefrom the Public Parking Authority of the City of Pittsburgh but did include operator or lessees under the Public Parking Authority. The Court held that the exclusions from the definition "commercial parking place" were reasonable classifications and not violative of Article IX Section 1, but did hold that the exclusion of the Public Parking Authority of the City of Pittsburgh did violate the uniformity clause of the Constitution and to that extent sustained the appeal of the plaintiffs. In so holding the Court also stated: ". . . It should be noted that the Parking Authority Law provides that 'any property acquired or used by the Authority for its purposes is exempt from any taxes. We are of the opinion that this does not exempt taxes upon parking transactions which under this Ordinance are in the nature of excise taxes as contrasted to property taxes . . ." This statement by the Court was not necessary to the determination of the issue before it and is clearly dictum. The question before the *McGillick* court was the reasonableness of the classification of the various subjects of taxation. The question of the nature of the tax and exemption therefrom was not before the Court nor necessary for its decision. It is also true that the inclusion of a particular subject for taxation does not mean that it cannot be exempt therefrom. Exclusion is not equated to exemption no more than inclusion is equated to non-exemption.

The order entered by the *McGillick* Court as herein applicable is as follows:

> " . . ., the Pittsburgh Parking Tax Ordinance No. 434 of 1962 is hereby declared to be valid except for that part of Section (2e) which excludes the Public Parking Authority of the City of Pittsburgh from the definition of the term 'operator'; . . ."

The Supreme Court on appeal entered the following order:

> "Opinion *Per Curiam*, September 29, 1964: Order affirmed."

A *Per Curiam* order without opinion merely affirms the result of the lower Court. A judgment of affirmance is not to be understood as necessarily expressing the concurrence of the appellate court in all the conclusions or reasoning expressed in the opinion filed by the court below. Standard Pa. Practice, Vol. 9, page 586. It is inconceivable that important questions of public policy could be thought to be settled authoritatively for the future by mere silence of an appellate court.

In the *Allegheny County v. Moon Township* case, *supra*, the township passed an ordinance providing for a ten percent tax on gross receipts of each commercial parking lot in the township.[7] One of the lots

[7] At oral argument the Court was informed that the Moon Township Ordinance is substantially identical to the Pittsburgh Parking Tax Ordinance.

was located at the Allegheny County Airport which was owned by Allegheny County but operated by a concessionare. Previously, in the case of Moon Township Appeal, 378 Pa. 144, 127 A. 2d 361 (156) the Supreme Court held that the same parking lot was "public property used for public purposes" and therefor tax-exempt. The township took the position that the *Moon Township Appeal* case dealt with property taxes whereas the *Allegheny County v. Moon Township* case deals with an "excise tax". The Court in rejecting this distinction and in holding the concessionare operated parking lot owned by the County of Allegheny exempt from the township parking tax said:

> ". . . Unfortunately for the township, the tax-exempt status of this parking lot does not depend on the label attached to the tax."

The Court after quoting Article VIII, Section 2 of the Constitution cited the General Assembly Assessment Law, Act of May 22, 1933, P. L. 853, Art. II, § 204, as amended, 72 P. S. Sec. 5020-204(g) which provides:

> "The following property shall be exempt from all . . . (City) . . . township . . . tax, to wit . . . (g) All other public property used for public purposes . . .,"

stated in relation thereto:—"Neither the constitution, nor the statute, say the exemption will be only for property taxes; the statute, in fact, expressly says

'all tax'. The word 'property' is used merely to describe the locus of what the Legislature was exempting, not the type of tax it was exempting it from. There is no reason to assume that the Legislature did not fully exercise its constitutional power to exempt this property, not only from property taxes, but also from taxes on activities conducted on the property . . ."

Having to choose between two cases out of our Supreme Court dealing with the question involved in the instant case, one of which, *i.e.*, the *McGillick* case, was a *Per Curiam* affirmance without opinion, and one of which, *i.e.*, the *Allegheny County v. Moon Township* case, is a decisional opinion having the force of stare decisis, we have no choice but to follow the latter case.

The Act of 1933, *supra*, refers to (g) "all other public property"; Section 6 of the Parking Authority Law uses the phrase "any property acquired or used by them for such purposes" (public). The Statutory Construction Act, Act of 1937, May 28, P. L. 1019 Art. IV, § 51, 46 P. S. 551, mandates that words used in similar statutes be given similar meaning. Since "property" in the Act of 1933 is used "merely to describe the locus of what the Legislature was exempting, not the type of tax it was exempting it from", *Allegheny County v. Moon Township, supra*, the same holds true as to the use of the word "property" granting exemption in the Parking Authority Law.

Again the Act of 1933, refers to ". . . all . . . tax"; about which the Supreme Court said in *Allegheny County v. Moon Township, supra,* " . . . neither the Constitution, nor the statute, say the exemptions will be only for property taxes; the statute, in fact, expressly says (the following property shall be exempt from) 'all tax'." Section 6 of the Parking Authority Law uses the phrase ". . . shall not be required to pay *any** taxes . . . upon *any** property . . ."

In order to determine the meaning of the word "any" in this section of the Parking Authority Law, resort must be had to the Statutory Construction Act, *supra,* in order to ascertain and effectuate the intention of the Legislature. In the creation of Parking Authorities, the Legislature sought to grant an exemption to them, acting as an agency of the Commonwealth (Section 1, 2) for public purposes from any taxes or assessments. Although, the Statutory Construction Act, demands that "provisions exempting persons and property from taxation" be strictly construed, such a rule must give way in the face of manifest legislative intent.

The word "any" is a broad and comprehensive term and generally means "all" or "every" but not always, 3 A Words and Phrases 64 *et seq.* The Websters Third New International Dictionary defines "any" in three gramatical uses; as a pronoun, an adverb and, appropriate to this case, as an adjective, as follows: (1) One differently out of more than two;

* Emphasis added.

(2) one, some or all indiscriminately of whatever quantity—(b) all—used as a function word to indicate the maximum or whole or a number or quantity.

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used". *Towne v. Eisner*, 245 U. S. 418, 38 St. Ct. 158 (1918). The meaning of a word in a statute "depends on its legislative environment." *Georgia v. Evans*, 316 U. S. 159, 62 St. Ct. 972 (1942).

If we were to interpret "any" as used in the context of the Parking Authority Law in anyway other than in an all inclusive manner we would undermine the basic principal of law that generally and in absence of express statutory authority, public property devoted to public use is not subject to taxation, and no express exemption is necessary, (citations *supra*). Therefore "any" taxes means "all" taxes, otherwise the consequence would alter the fundamental policy of exempting public property devoted to public use from taxation.

Further, Section 6 of the Parking Authority Law uses the language ". . . shall not be required to pay any taxes . . . upon any *property acquired or used** by them for such purposes . . ." The Act, Sections 1, 2, contemplates the Authority will acquire property for its purposes both as a holder of the fee and as a

* Emphasis added.

lessee. It is certain from the exempting language of Section 6 in light of the manner of acquiring property, Section 1, 2, that the tax exemption is for other than property real estate taxes and thus includes taxes on the use of the property. Taxes on the use of property are generally denominated excise taxes. Hence, it is obvious from the legislative language employed that the exemption from paying "any" taxes means all taxes both real estate and excise taxes.

Summary judgment will be entered for the plaintiffs.

ORDER.

AND Now, this 29 day of December, 1973, after argument, consideration of the briefs of the parties and a review of the record, the plaintiffs' motion for summary judgment is granted, and further:

1. The City of Pittsburgh is enjoined and restricted from enforcing Ordinance No. 704 against any of the plaintiffs as to the following facilities:

Lessee	*Location*
Associated Dry Goods Corporation—Joseph Horne Co.	Sixth Street and Fort Duquesne Blvd.
Gimbel Brothers, Inc.	Smithfield Street and Liberty Ave.
The May Department Store Company	Fifth Ave. at Cherry Way; Blvd. of the Allies and Cherry Way
Parking Service Corporation	Ninth Ave. and Penn Ave; Bigelow Blvd., Third Ave.

2. The City of Pittsburgh is ORDERED to repay to the plaintiffs as their interest may appear all taxes paid pursuant to Ordinance No. 704 for the years 1970 and 1971 arising from the operation of the aforesaid facilities.

BY THE COURT:
SILVESTRI, *J.*

Eo die, Exceptions noted and bill sealed.

BY THE COURT:
SILVESTRI, *J.* (SEAL)

Order.

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PATRICK N. BOLSINGER
Prothonotary

SALLY MRVOS
Deputy Prothonotary

Pittsburgh, Pa.
15219

January 25, 1973

Leonard Boreman, Esq.
1018 Frick Building
Pittsburgh, Pa. 15219

Re: Alco Parking, Corp., et al. v.
City of Pittsburgh
No. 330 Allocatur Docket

Dear Mr. Boreman:

This is to advise you that the Court has entered the following Order on your petition for allowance of appeal from the Order of the Commonwealth Court at No. 643 C. D., 1971, in the above-captioned matter: "January 23, 1973, Petition granted. *Per Curiam.*"

Accordingly, I am enclosing herewith an appeal and affidavit for your use in taking this appeal to the Supreme Court. Will you please execute the same and return it to this office promptly so that your case may receive a number in the Supreme Court. The case will

be listed for the session commencing in Pittsburgh on March 12, 1973. The fee for filing the appeal is $108.00.

You may want to collect your brief from the Commonwealth Court as you may use the same brief and record provided the covers are changed to show the Supreme Court number and term, and the specifications set forth in Rule 49 of the Supreme Court Rules (Revised and Renumbered as of July 1, 1972) are observed. You may then file ten copies of the brief. However, if new briefs are used, 30 copies must be filed. I have one copy of your paper books filed with this Court when you filed the petition for allocatur, and you may stop over for them at your convenience.

Very truly yours,

(Miss) Sally Mevos,
Deputy Prothonotary.

SM:ad

Enclosure

cc: Ralph Lynch, Jr., Esq.
Leonard M. Marks, Esq.

Opinion of the Supreme Court of Pennsylvania (printed in the Appendix to the Petition for Certiorari at pages 1a through 49a).

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

ALCO PARKING CORPORATION; ARENA PARKING, INC; CAMPUS PARKING INC; FOURTH AVENUE PARKING, INC.; GRANT PARKING, INC.; HARRY W. SHEPPARD, JR., t/a STANWIX AUTO PARK; JOHN COMINOS, t/a LIBERTY PARKING; JOHN STABILE and ROCCO A. DEL SARDO, t/a WM. PENN PARKING LOT; K-SEVEN PARKING COMPANY; MEYERS BROS, PARKING-CENTRAL CORP.; PARKING SERVICE CORPORATION, INC.; WM. PENN PARKING GARAGE, INC.,

Appellants

v.

CITY OF PITTSBURGH

No. 90 March Term, 1973

PETITION FOR REARGUMENT

AND NOW comes Petitioner, City of Pittsburgh, by its undersigned counsel, and files a Petition for reargument pursuant to Rule 64 of this Honorable Court, averring the following:

1. By Opinion and Order dated July 2, 1973, this Court, with one Justice concurring in the result and three Justices dissenting, reversed the Commonwealth Court and the Court of Common Pleas of Allegheny County and held that the City of Pittsburgh Parking Tax on 20% of the gross receipts of parking operators constituted an unconstitutional taking and con[illegible]

of private property prohibited by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

It is respectfully submitted that the plurality opinion of Justice Roberts, beginning at page 11 (Part IV) thereof is based upon a misconception of the facts in at least three crucial particulars:

a) All day rates at Authority garages do not average $2.00 compared with $3.00 at private operators' garages, as the plurality opinion asserts, but are in fact higher than private rates.

b) The plurality opinion stresses that the Parking Authority competes with the private operators when in fact the Parking Authority not only does not operate its facilities but hires private operators, including Plaintiffs, under various financial arrangements, including fixed fees and percentage of profits contracts.

c) The Parking Authority of Pittsburgh is not an arm of the City, but is an independent agency of the Commonwealth.

The alleged unfair competition with the Parking Authority is crucial to the plurality opinion

The plurality opinion holds that, because of the competition of the Parking Authority, the 20% rate is confiscatory. At page 11, Justice Roberts states the operators position, which he accepted:

> "Appellants' second avenue of attack is that the Parking Tax Ordinance, coupled with direct economic competition by the Public Parking Authority, created with public funds (see Price v. Philadelphia Parking Authority, 422 Pa. 317, 335, 221 A.2d 138, 143 (1966)), violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Specifically appellants maintain that the ordinance imposes a rate so excessive and unreasonable in light of the direct governmental competition, that it amounts to a confiscation of property without just compensation." (Emphasis added)

The opinion purports to distinguish Samuels (Philadelphia v. Samuels, 338 Pa. 321, 12 A.2d 79 (1940)) and Eglin (Philadelphia v. Eglin's Garages, Inc., 342 Pa. 142 19 A.2d 845 (1945)), on the basis that unlike there where the rate itself was challenged, here "the allegedly excessive and unreasonable tax is combined with direct competition at lower rates from the Pittsburgh Parking Authority." (Emphasis added) (P. 14).

Again, at page 17, the opinion admits that your Honorable Court has never before held a tax to be excessive and unreasonable, but asserts that this situation is different because of the competition by the Authority.

Likewise, A. Magnano Co. v. Hamilton, 292 U.S. 40, 4 S.Ct. 599 (1933), in which the Supreme Court of the United States held that the Due Process Clause does not set limits on the rate of taxation a legislative body can impose, is purported to be distinguished by the competition aspect. (P. 15).

In at least five places in the plurality opinion Justice Roberts refers to the "lower rates" of the Parking Authority. In particular, the opinion notes (P. 11):

> "For example, the record establishes that the average all day rate for the Public Parking Authority is about $2.00, while the average all day rate for private operators is approximately $3.00."

Justice Roberts used this alleged disparity in rates to show the inability of the operators to pass the tax on to the patrons. (P. 14):

> "Clearly if the private parking lot operators attempted to pass the full burden of the tax on to the consumers they would only succeed in increasing the disparity in the already disparate rates. For example, at the all day rates shown in the record, if appellants were to attempt to pass the tax on to their patrons, their rates would increase from an average of $3.00 to $3.60, while a similar tax pass-on by the Public Parking Authority would increase their average rate from $2.00 to $2.40. Thus the differential in rates would increase from $1.00 to $1.20."

a) Authority all-day rates are higher, not lower.

It is apparent that the allegedly lower rates charged by the Parking Authority constitute the heart of Justice Roberts' opinion. The fact is, however, that the plurality's assertion that the all-day rate is $2.00 for the Authority and $3.00 for the private operators is nowhere supported by the record, and is simply incorrect. In fact the record reveals that the Authority's all-day rate is higher than the private operators' Plaintiffs' own expert testified that the Authority's average nine-hour rates were $2.56, compared with $2.37 for private operators. (R. 341a). The assertion that the private operators cannot raise rates because the disparity between their already higher rates and the lower Authority rates will be increased not only ignores the finding of a 4100-car excess demand in downtown Pittsburgh (Findings 10 and 19, R. 763a, 764a), but most importantly, it is based on a faulty premise, that Authority all-day rates were much lower than private, whereas Authority rates are actually higher.

Although certain other rates of the Authority are lower than corresponding private rates, it is impossible to determine from this record what percentage of parkers park one hour or three hours as opposed to all day. Moreover, the Parking Authority garages are characterized by self-parking, while the other facilities are almost entirely attendant-operated, enabling the Authority garages to charge the lower rate.

comparing Authority garages without the labor costs of attendants to other garages with such labor costs is comparing apples to oranges. Since the heavy burden of proving unconstitutionality rests on the operators, a showing that some Authority rates are higher and some lower falls far short of the requisite proof, even assuming that any such proof would be legally sufficient.

Moreover, the fact that the rate structure of the Authority differs so from the private operators', shows that they are not competitors nearly so much as Justice Roberts asserts.

b) All Parking Authority garages are operated by private operators, including plaintiffs, for a consideration.

Rather than "take" plaintiffs' private property by way of Authority competition, the Parking Authority has given plaintiffs and other private operators additional private property by permitting them the opportunity to operate garages for a substantial consideration in high land cost areas. The Authority operates no garages on its own, but leases them to private operators. The record reveals that of the eight Authority downtown garages, (P.Exh. 11, R. 648a), plaintiffs Shepard and Stabile themselves operate five (R. 180a, 196a-197a,227a), representing all but 2407 Authority spaces (Pl. Exh. 11, R. 648a), a mere 10% of the downtown spaces. By Stabile's own testimony, about 80% of the lots included in plaintiffs' Exhibit 1 are his, and about 5 to 60% of the downtown parking operations are controlled by him (R. 228a). Shepard's testimony indicates that he is in all likelihood the second largest private operator in the City.

Thus, the situation is not, as the plurality opinion painted it, the Authority competing against the private operators, but rather private operators operating all of the garages in Pittsburgh including the Authority garages, with the major plaintiffs being the major operators of the Authority garages. For instance, three of the four garages operated by plaintiff Parking Service Corporation are Authority garages. Plaintiffs are well compensated for these services, under various financial arrangements including fixed fees and percentage of profits contracts. (See Pl. Exh. 1, e.g., R. 551a, 552a; R. 180a).

c) The Authority and the City are not synonymous.

The plurality opinion treats the Parking Tax not as the revenue raiser which it clearly is, but as a sinister attempt by the City of Pittsburgh to take property of the private operators to use for its own purposes. The plurality opinion, in a footnote, speaks of "transferring dollars from one pocket of an instrumentality of City government to another." (P. 17, fn. 9).

The plurality is thus ignoring four decades of Authority law, which have carefully distinguished between an authority and its organizing municipality. In Whitemarsh Twp. Auth. v. Elwert, 413 Pa. 329, 332, 196 A.2d 843 (1964),

the Court, speaking through Justice O'Brien, held:

> "In Simon Appeal, 408 Pa. 464, 184 A.2d 695 (1962), we held that Municipality Authorities are not the creatures, agents or representatives of the organizing municipality. Rather, we held, they are independent agencies of the Commonwealth and part of its sovereignty. We further held, that the powers of Municipality Authorities are contained in the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, as amended, 53 P.S. §301 et seq., and not in the codes granting powers to the various classes of municipalities of the Commonwealth." (Emphasis added)

ee also Com ex rel McCreary v. Major, 343 Pa. 355, 22 A.2d 686 1941); Tranter v. Allegheny Co. Authority, 316 Pa. 65, 79, 73 A. 289 (1934).

Section 5(a) of the Parking Authority Law, Act f June 5, 1947, P.L. 458, as amended, 53 P.S. §345, provides in elevant part that a Parking Authority "shall in no way be eemed to be an instrumentality of the city or engaged in the erformance of a municipal function." (Emphasis added). ee Pittsburgh Pub. Park. Auth. Petition, 366 Pa. 10, 13, 76 A.2d 20 (1950).

Thus the instant case is not, a. the plurality asserts controversy where the taxing body was in direct competition . .with private enterprise . . ."(p.17) The Authority rply is not the taxing body.

3. For the reasons stated at length in the Dissenting Opinion of Justice Eagen, joined by Chief Justice Jones, and the Dissenting Opinion of Justice Pomeroy, it is submitted that the plurality opinion has misapprehended the law in this area, in failing to hold that:

a) The power to tax for revenue purposes is not limited by the Due Process Clause, and

b) Court interference with the setting of a tax rate by the City is a usurpation of a legislative function by the judiciary, and a violation of the separation of powers doctrine.

WHEREFORE, in light of (1) the importance of the issue to the treasury of the City of Pittsburgh; (2) the tremendously important legal issues at stake here; and (3) the several crucial errors of fact at the heart of the plurality opinion, it is respectfully requested that this Honorable Court grant this petition for reargument.

Respectfully submitted,

RALPH LYNCH, JR.
City Solicitor

GRACE HARRIS
Assistant City Solicitor

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

Before me, the undersigned authority, personally appeared PETE FLAHERTY, who being duly sworn according to law deposes and says that he is the Mayor of the City of Pittsburgh and authorized to make this Affidavit on its behalf; and that the facts contained therein are true and correct to the best of his knowledge, information and belief.

Sworn to and subscribed
before me this 12th day
of July, 1973.

Notary Public
EMMA R. MARMO, Notary Public
Pittsburgh, Allegheny Co., Pa.
My Commission Expires
December 5, 1975

Answer to Petition for Reargument

IN THE SUPREME COURT OF PENNSYLVANIA

Western District

ALCO PARKING CORPORATION; ARENA PARKING, INC.; CAMPUS PARKING, INC.; FOURTH AVENUE PARKING, INC.; GRANT PARKING, INC.; HARRY W. SHEPPARD, JR., t/a STANWIX AUTO PARK; JOHN COMINOS, t/a LIBERTY PARKING; JOHN STABILE and ROCCO A. DEL SARDO, t/a WM. PENN PARKING LOT; K-SEVEN PARKING COMPANY; MEYERS BROS. PARKING-CENTRAL CORP.; PARKING SERVICE CORPORATION, INC.; WM. PENN PARKING GARAGE, INC.,	:	No. 90 March Term, 1971
Appellants	:	
vs.		
CITY OF PITTSBURGH		

ANSWER TO PETITION FOR REARGUMENT

AND NOW come appellants above named, by their attorneys, Leonard Boreman, Richard H. Martin and Baskin, Boreman, Wilner, Sachs, Gondelman & Craig, and, in answer to the Petition for Reargument of appellee, City of Pittsburgh, state as follows:

1. Petitioner-appellee asserts that this Court's decision herein rests on the unfair competition between the Public Parking Authority

f the City of Pittsburgh and the private parking operators, appellants herein, d that "the heart of Justice Roberts' opinion" is that the Parking Authority arges lower rates than the private operators. (See appellee's Petition for argument, pages 3, 5) In its effort to demonstrate an alleged weakness f the factual foundation of the decision, the appellee asserts as its basis a ngle criteria, to-wit, that the average all-day parking rate (out of ten or ore separate rates charged by the Parking Authority and private operators ike), is higher in the case of the Parking Authority than that charged by the rivate operators. Thus, the appellee claims that "the plurality's assertion at the all-day rate is $2.00 for the Authority and $3.00 for the private erators is nowhere supported by the record".

Contrary to petitioner-appellee's assertions, this statement is rectly substantiated by the record. For example, the all-day (10-hour) rate r seven private operations -- the Stanwix Garage, the four Grant-Smithfield ts, the Oliver Plaza Garage and the Oliver Plaza lot, among others -- was .00 in 1970 (R., pp. 618, 578), while the rate for the same interval at ree competing Public Parking Authority garages at Bigelow Boulevard, hird Avenue and Ninth Street, was only $2.00 (R., p. 554).

The most thorough compilation of Public Parking Authority and rivate rates is contained in the June, 1970 report by national parking perts Wilber Smith & Associates, who were retained to make the study by

the Public Parking Authority of Pittsburgh itself. (R., p. 639) Said report is reprinted in full at pages 639 through 711 of the record. Table 3 of said report, reproduced at page 659 of the record, clearly demonstrates the disparities between the rates charged by the Public Parking Authority and private operators:

" TABLE 3

AVERAGE PARKING RATES

Interval	Public Lots (1)	Public Garages (2)	Parking Authority Garages (3)
1-Hour	$ 0.63	$ 0.70	$ 0.35
2-Hours	0.97	0.92	0.51
3-Hours	1.25	1.15	0.83
All-Day	1.97	2.11	1.73

(1) 20 public lots.
(2) Eight public garages.
(3) Eight Parking Authority garages. "

The table shows that the short-term parking rates of the Parking Authority garages, which Donald M. McNeil, the appellants' expert, testified is the critical factor for a "successful financial program) (R., p. 352a), are an average of one-half the private operators' rates, and that for any interval the Public Parking Authority substantially undercuts the rates of its private competitors.

Even though the parking rates of the Parking Authority were raised in some (but not all) of the garages in 1970, the competitive rate disadvantage inflicted on the private operators by the Public Parking Authority was succinctly summarized in the comments to the report of Mr. Donald M. McNeil, an expert in parking and traffic engineering, who previously served as the Acting Coordinator for the Public Parking Authority of Pittsburgh and Traffic Engineer of the City of Pittsburgh:

> "Up to 3 hours of parking time rates in privately owned garages were approximately twice those in the publicly owned garage. In 1969 the rates for between 5 and 9 hours of parking time were approximately 30 to 40% higher in the privately owned garages, but due to the rise in rates at the publicly owned garages, effective Feb. 1, 1970, this difference had dropped to where the private rates were only about 20 to 30% higher for from 5 to 9 hours of parking time." (R., p. 618)

Moreover, the City's allegation, at page 5 of its Petition for Reargument, that the Public Parking Authority's rates are lower because its garages are self-service is likewise entirely without basis in the record. The record demonstrates that outside of the tremendous governmental advantages afforded the Public Authority garages, they are operated in the same manner as the private garages. The same unions with the same wage rates are employed; public and private operations often have the same number of cashiers, parking attendants, managers and other employees; the

size of the facilities are comparable, and the method of operations are the same (see, e.g., Record, pp. 157-161). Second, the efficiency of operation of the various lots is analyzed in detail in the McNeil report, which shows that, on a per-car basis, the Authority's garages are just as expensive to operate with respect to wages, maintenance, overhead and every factor as privately-owned garages.

It is apparent that the Parking Authority garage rates are substantially lower than the private rates because of the economic advantage afforded the Authority by statute and exemption.

The appellee not only misreads the opinion of this Court, but is incorrect on its understanding of the record facts. It is quite apparent that the majority opinion did not ground its decision relative to confiscation on any single factor, such as rate differential, but attributed the "extraordinary competitive advantage" of the Parking Authority over private operators, and the ability of the former to charge lower rates than the latter, to four factors:

a). its exemptions from real estate taxes as a public agency;

b). the lower interest rates granted to municipal corporations seeking to borrow money;

c). the readily available and more attractive lower interest public financing of construction; and

d). "all the benefits which attend such governmental arrangements, not available to private businessmen". (See Opinion of the Court, p. 18)

The Court is, therefore, not relying solely on the facts in the record indicating that the Public Parking Authority does charge lower rates than private operators in substantially the entire rate structure, but states that because of the factors listed above, the Public Parking Authority has a competitive advantage, can and does charge lower rates and that the appellee appropriates practically all of the earnings of the private operators for itself by levying its 20% tax on gross receipts and thereby taking its exaction "off the top". (Opinion of the Court, p. 19)

2. Appellee next asserts that since the Public Parking Authority garages are operated by private operators under leases from the Authority there is, in fact, no competition between private operators and the Public Parking Authority.

While the garages of the Public Parking Authority are operated by private managers under leases and the private managers are paid management fees for their services, it does not follow in fact or logic that the Authority and the private operators do not compete. As stated in Public Parking Authority v. Board of Property Assessment, 377 Pa. 274, 105 A. 2d 165 (1954), the fact that the Authority has chosen to exercise its rights under Section 5 (b) (4) of the Parking Authority Law to lease the operation of its property to private managers is the considered choice of the Authority as the preferable method of operation and does not destroy its

public status for purposes of tax exemption. See, also, Price v. Philadelphia Parking Authority, 422 Pa. 317, 221 A. 2d 138 (1966). The enterprise being carried on at the Authority garage by the private manager under a management lease is, nevertheless, the Public Authority operation, carried out in accordance with the statutory mandate for the public benefit, and all revenues produced less expenses and a reasonable management fee accrue to the public treasury. Under these circumstances it is, indeed, remarkable that the appellee would take the position that the fact that the public body hires experts to manage its operations rather than attempt to operate the facilities itself negates any competition between that public body and the private operators. Such a position fails to recognize that both public and private garages compete for parking revenues and that revenues are produced by various factors, enumerated at length in the Court's opinion, of which management is only one. The issue is not who manages the Authority's garages, but the confiscatory impact on private operators of favored public competition in conjunction with the 20% tax on gross receipts.

3. The appellee asserts that this Court has ignored certain law to the effect that the Public Parking Authority and the City of Pittsburgh are separate entities, the former being an independent agency of the Commonwealth. However, such an argument ignores the fact that, regardless of their labels, the Authority and the City of Pittsburgh are both

governmental bodies and, to that extent, it matters little what label is attached to the governmental body conducting its governmental enterprise in competition with private enterprise. The fact remains that the private operators cannot make a profit due to a combination of the 20% gross receipts tax and favored governmental competition.

However, regardless of the labels used to describe the Public Parking Authority, it is clear that it is, in fact, an arm of the City of Pittsburgh. First, its Chairman and all of its members are appointed by the Mayor of the City of Pittsburgh and are directly responsible to his office;[1/] second, from 1966 through 1970, inclusive, the City of Pittsburgh has derived revenues from the operation of the Public Parking Authority in the amount of $1,626,154.00;[2/] and third, the debt of the Public Parking Authority is now computed as a debt of the City of Pittsburgh for purposes of the total debt limitations of the City under the provisions of the Local Government Unit Debt Act, 1972, July 12, P. L. _____, No. 185, §101; 53 P.S. §11-202, . 209.410. In fact, the only relevant factor pertaining to the Public Parking

---

1/ Included within the duties of the Board are the establishing of rates for all Authority facilities, and the control in the operation of such facilities.

2/ See Annual Report of the City Controller for Fiscal Year Ended December 31, 1966, at p. 30; 1967 at p. 30; 1968 at p. 36; 1969 at p. 36; 1970 at p. 37. Said Annual Reports were submitted to City Council by the City Controller and include, inter alia, statements of cash receipts and expenditures for the particular fiscal year. These documents are kept as public records in the offices of the City of Pittsburgh.

Authority which is not controlled by, or responsible to, the City of Pittsburgh is the fact that, in 1947, the Legislature of the Commonwealth provided the mechanism by which said Authority could come into existence, and this was only at the option of the local governmental body. See Parking Authority Law, Act of June 5, 1947, P. L. 458, as amended, 53 P.S. §341 et seq.

4. The record fully supports the Opinion of this Court which finds that the private garages are forced to charge rates higher than the Authority's by as much as 50% and more, just to be able to cover their operating expenses. At these rates, the great majority of private operators are unable to make a profit and have consistently operated at a loss. The unanimous finding of the Commonwealth Court, affirmed by this Court in its July 2, 1973 Opinion, is accurate: the 20% parking tax is completely unreasonable. The tax and the privileged public competition diverts to the City of Pittsburgh the entire economic benefit of the operation of the private garages, as directly as if the Authority had condemned the private garages. Such confiscation, in combination with direct governmental competition, is a taking of private property without just compensation, in violation of the due process clause.

BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG

Leonard Boreman

Richard H. Martin

Attorneys for Appellants

(Order of the Supreme Court on Petition for Reargument appears on page 50a of the Appendix to Petition for Writ of Certiorari.)

Supreme Court of the United States

No. 73-582

City of Pittsburgh,

Petitioner,

v.

Also Parking Corporation, et al.

ORDER ALLOWING CERTIORARI. Filed January 7, 1974.

The petition herein for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania, Western District, is granted.

FILE COPY

Supreme Court, U
FILE
OCT 1 19
MICHAEL RODAK, JR.

In the Supreme Court of the United States

October Term, 1973
No. 73 582

CITY OF PITTSBURGH, *Petitioner*

vs.

ALCO PARKING CORPORATION; ARENA PARKING, INC.; CAMPUS PARKING, INC.; FOURTH AVENUE PARKING, INC.; GRANT PARKING, INC.; HARRY W. SHEPPARD, JR., t/a Stanwix Auto Park; JOHN COMINOS, t/a Liberty Parking; JOHN STABILE and ROCCO A. DEL SARDO, t/a Wm. Penn Parking Lot; K-SEVEN PARKING COMPANY; MEYERS BROS. PARKING—CENTRAL CORP.; PARKING SERVICE CORPORATION, INC.; WM. PENN PARKING GARAGE, INC.,

Respondents

PETITION OF THE CITY OF PITTSBURGH FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

GRACE S. HARRIS,
Special Assistant City Solicitor,
313 City-County Bldg.,
Pittsburgh, Pa. 15219,
Attorney for Petitioner.

Of Counsel:
RALPH LYNCH, JR.,
City Solicitor.

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840
Harry Haas, Pittsburgh Representative, Tel. 421-4723

TABLE OF CONTENTS

	PAGE
Petition of the City of Pittsburgh for a Writ of Certiorari to the Supreme Court of Pennsylvania	1
Opinions Below	2
Jurisdiction	3
Questions Involved	3
Constitutional Provision and Ordinance Involved	4
Statement of the Case	5
Reasons for Granting the Writ:	
I. The due process clause of the Fourteenth Amendment is not a limitation upon a revenue tax	10
II. Assuming arguendo that a high tax rate combined with competition from the taxing body could in a proper case be considered confiscatory, plaintiffs have not proven confiscation here	26
Conclusion	31

TABLE OF CITATIONS

CASES:

Alaska Fish Co. v. Smith, 255 U.S. 44 (1921)	13, 15
Bode v. Barrett, 344 U.S. 583 (1953)	15
Bowman v. Kansas City, 361 Mo. 14, 233 S.W. 2d 26 (1950)	20

Brushaber v. Union Pac. R. Co., 240 U.S. 1 (1916) 15

Dean v. Gadsden Times Publishing Co., —— U.S. ——, 93d S. Ct. 2264 (1973) 16

Fiske v. Kansas, 274 U.S. 380 (1927) 27

Fox v. Standard Oil Co., 294 U.S. 87 (1935) 25

Gate City Garage v. City of Jacksonville, 66 So. 2d 653 (Fla. 1953) 20

Griswold v. Connecticut, 381 U.S. 479 (1965) .. 25

Harvester Co. v. Dept. of Taxation, 322 U.S. 435 (1944) 13

Hasegawa v. Main Pineapple Co., 52 Hawaii 327, 475 P. 2d 679 (1970) 15, 16

Jayne v. City of Detroit, 348 U.S. 802 (1954) .. 19

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 15

A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934) 10, 12, 13, 15, 16

McCray v. United States, 195 U.S. 27 (1904) ...15, 25

McCulloch v. Maryland, 4 Wheat. 316 (1819) ...23, 24

McGillick v. Pittsburgh, 415 Pa. 581, 203 A. 2d 480 (1964) 14

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 27

Philadelphia v. Eglin's Garages, Inc., 342 Pa. 142, 19 A. 2d 845 (1941) 14

Philadelphia v. Samuels, 338 Pa. 321, 12 A. 2d 79 (1940) 14

Public Parking Authority of Pittsburgh v. City of Pittsburgh, No. 687 July Term, 1972 28

Puget Sound Co. v. Seattle, 291 U.S. 619 (1934) 18, 20, 21, 29

Shapiro v. City of New York, 325 N.Y.S. 2d 787, 67 Misc. 2d 1021 (1971) 14, 15

Simon Appeal, 408 Pa. 464, 184 A. 2d 695 (1962) 9

Stewart Dry Goods Co. v. Lewis, 294 U.S. 525 (1935) 25

United States v. Sanchez, 340 U.S. 42 (1956) .. 15

U. S. v. Central Eureka Mining Co., 357 U.S. 155 (1958) 16

Veazie Bank v. Fenno, 75 U.S. 482, 8 Wall. 533 (1869) 17, 24

Whitemarsh Twp. Auth. v. Elwert, 413 Pa. 329, 196 A. 2d 843 (1964) 9

MISCELLANEOUS:

City of Pittsburgh Ordinance No. 704 of 1969 .. 4, 5, 28

Parking Authority Law of June 5, 1947, P. L. 458, 53 P.S. Sec. 341 et seq. 6, 8

Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964) 15

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973
No.

City of Pittsburgh,

Petitioner

v.

Alco Parking Corporation; Arena Parking, Inc.; Campus Parking, Inc.; Fourth Avenue Parking, Inc.; Grant Parking, Inc.; Harry W. Sheppard, Jr., t/a Stanwix Auto Park; John Cominos, t/a Liberty Parking; John Stabile and Rocco A. Del Sardo, t/a Wm. Penn Parking Lot; K-Seven Parking Company; Meyers Bros. Parking—Central Corp.; Parking Service Corporation, Inc.; Wm. Penn Parking Garage, Inc.,

Respondents

PETITION OF THE CITY OF PITTSBURGH FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To: The Honorable Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, the City of Pittsburgh, respectfully prays that a writ of certiorari issue to review the decree of the Supreme Court of Pennsylvania entered in the above case on July 2, 1973.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, dated July 2, 1973, appears at page 1a of the Appendix and is reported at Pa. , 307 A. 2d 851.

The opinion of the Commonwealth Court of Pennsylvania, dated October 10, 1972, upon rehearing, appears at page 51a of the Appendix and is reported at 6 Commonwealth Ct. 433, 295 A. 2d 349.

The first opinion of the Commonwealth Court of Pennsylvania, dated June 8, 1972, appears at page 55a of the Appendix and is reported at 6 Commonwealth Ct. 433, 291 A. 2d 556.

The opinion and final decree of the court en banc of the Court of Common Pleas of Allegheny County, dated July 14, 1971, appear at pages 78a and 83a of the Appendix and are unreported.

The opinion and decree nisi of the Court of Common Pleas of Allegheny County, dated March 19, 1971, appear at pages 84a and 102a of the Appendix and are reported at 119 P.L.J. 327.

Jurisdiction
Questions Involved

JURISDICTION

Petitioner seeks review of the decree and opinion of the Supreme Court of Pennsylvania dated July 2, 1973 (A. 1a). Rehearing was denied by the Supreme Court of Pennsylvania by order dated August 7, 1973. The jurisdiction of the Supreme Court of the United States is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C. §1257 (3).

QUESTIONS INVOLVED

I. Do this Court's interpretations of the due process clause and the separation of powers doctrine prohibit the judiciary from imposing a limitation upon the legislatively set rate of a revenue tax even where the taxpayer competes with a governmental agency exempt from certain taxes?

II. Have respondents proved confiscation where they have not shown (1) that they are forced out of business, and (2) that the tax cannot be passed on to customers?

(Petitioner requests that these questions be answered in the negative.)

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

The fourteenth amendment to the Constitution of the United States provides, in relevant part:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

City of Pittsburgh Ordinance No. 704 of 1969 is set forth in full beginning at page 103a of the Appendix.

STATEMENT OF THE CASE

On February 20, 1970 twelve operators (respondents herein) of off-street parking facilities located in the central city area of the City of Pittsburgh filed an action to enjoin enforcement of City of Pittsburgh Ordinance No. 704 of 1969 (A. 2a)* (herein the "Parking Tax Ordinance").

The Parking Tax Ordinance was enacted *"to provide for the general revenue"* (A. 103a) by imposing a tax on the privilege of engaging in non-residential parking transactions for a consideration. (Emphasis added.) It established the rate at 20% of the gross receipts derived from engaging in parking transactions, superseding and replacing a 1968 ordinance which had levied the identical tax at the rate of 15%. The 15% tax enacted in 1968 had, in turn, superseded and replaced the initial Parking Tax Ordinance enacted in 1962 at the rate of 10% (A. 2a).

At the time of suit, respondents owned and operated approximately 17,000 of the 18,000 private spaces in the downtown area of the City, thus controlling approximately 71% of the 24,300 spaces there. (A. 2a; 53a; 62a). Other private operators, not respondents in this case, controlled about 1000 spaces (4%). The balance of about

* References designated by "A." are to pages of the Appendix filed herewith.

References designated by "R." are to pages of the Record filed in the Supreme Court of Pennsylvania.

6100 spaces (25%) was owned by the Parking Authority of the City of Pittsburgh, an independent agency of the Commonwealth of Pennsylvania created pursuant to the Parking Authority Law of June 5, 1947, P. L. 458, 53 P.S. §341 et seq. (A. 62a; Finding No. 8, A. 87a).

The 71% of the industry represented by respondents paid $1.3 million in parking tax out of the total industry payments of $2.1 million at the 15% rate in 1969, and respondents paid $1.6 million at the 20% rate in 1970 (A. 62a; R. 617a). The tax has thus raised approximately $2.5 million dollars per year since 1970 (A. 43a; R. 617a).

This suit sought to enjoin the enforcement of the Parking Tax Ordinance on the grounds (1) that it created a discriminatory and arbitrary classification in violation of the equal protection and uniformity clauses of the federal and state constitutions; and (2) that it constituted a confiscatory taking in violation of the due process clause of the fourteenth amendment (A. 85a). After an Answer was filed by the City, the matter was tried on September 15-17, 1970. On March 19, 1971, the Court of Common Pleas filed an Adjudication and Decree Nisi, together with Findings of Fact and Conclusions of Law (A. 84a). The Court held that the tax violated no constitutional provisions.[1]

[1] Both the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania unanimously agreed with the Court of Common Pleas and petitioner City that the Parking Tax was not violative of the equal protection clause or the uniformity clause. This statement will therefore deal only with those portions of the courts' opinions dealing with the due process clause.

Although the Pennsylvania Supreme Court, as noted by the dissents, paid scant heed to the chancellor's findings (A. 42a), which have the force and effect of a jury verdict (A. 28a), those findings, most of which were not disputed by the Supreme Court (A. 16a), are significant.

The chancellor, noting that respondents were all still in business, found that the parking tax was not forcing the operators out of business (A. 98a). The chancellor pointed out that respondents' gross receipts, *after* the parking tax, increased in 1969 despite the increase in the parking tax from 10% to 15%, and remained virtually stable for the first 6 months of 1970 after the increase from 15% to 20% (A. 99a). Moreover, he found that any decreased return resulted from increased labor costs and other operating expenses as well as the parking tax (A. 99a).

The chancellor's finding that the parking tax was not forcing respondents out of business was buttressed by his findings concerning their failure to pass the tax on to their customers. Among other things, the chancellor found (A. 16a; 42a; 89a-90a):

> "19. The demand for parking spaces in the City of Pittsburgh far exceeds the supply.
>
> 20. None of the plaintiffs have increased their rates since February of 1970.
>
> 21. Plaintiffs have not attempted to pass on the increased tax to the parking lot patrons.
>
> 27. The City of Pittsburgh experienced only a temporary reduction in the number of cars parked at its facility on the Wharf after it doubled its price for parking."

Furthermore, one of the respondents, Sheppard, testified on cross-examination as follows (R. 198a):

> "Q. Sir, has it been your experience in the past that when you increase the rates you also receive an increase in your revenue?
>
> A. Yes, sir."

The Appendix to the Dissenting Opinion of Justice Pomeroy (A. 49a) shows clearly that respondents themselves recognized that rates could be raised in order to maximize revenues.

Respondents' exceptions to the Decree Nisi of the Chancellor were overruled by the court en banc in an Opinion and Final Decree dated July 14, 1971 (A. 78a).

Respondents appealed to the Commonwealth Court of Pennsylvania, which issued an opinion on June 8, 1972 (A. 55a) and again, adhering to the same division after reargument, on October 10, 1972 (A. 51a). While suggesting that the tax rate was too high, the majority (4-3) recognized that courts cannot interfere with the legislative function of setting a tax rate when, as here, the ordinance is clearly an exercise of the taxing power (A. 64a).

The Supreme Court of Pennsylvania then allowed an appeal and, by a 4-3 majority, reversed the courts below. Justice Roberts, for the majority,[2] held that the parking tax violated the due process clause of the fourteenth amendment because of its high rate, combined with the fact that "the taxing body was in direct competition . . . with private enterprise"[3] (A. 21a).

---

[2] Justice Roberts' opinion was joined in by only two other Justices. Justice O'Brien concurred in the result (A. 27a).

[3] Actually, §5 of the Parking Authority Law, 53 P.S. §345, provides in relevant part, that a Parking Authority "shall in no

Three justices of the Pennsylvania Supreme Court dissented. Justice Eagen, in an opinion concurred in by Chief Justice Jones and Justice Pomeroy, concentrated upon the incorrect legal underpinnings of the majority opinion, pointing out that the case law in this Court has long interpreted the due process clause to allow the legislative body to set a tax rate without interference from the judiciary (A. 27a). Justice Pomeroy, in a separate dissenting opinion, dealt largely with respondents' failure to show sufficient facts to entitle them to relief (A. 38a).

The City's petition for reargument was denied by per curiam order dated August 7, 1973, Justice Eagen dissenting (A. 50a).

---

way be deemed to be an instrumentality of the city or engaged in the performance of a municipal function." Moreover, the Pennsylvania courts had, prior to this case, consistently distinguished between an authority and its organizing municipality. *Whitemarsh Twp. Auth. v. Elwert*, 413 Pa. 329, 332, 196 A. 2d 843 (1964); *Simon Appeal*, 408 Pa. 464, 184 A. 2d 695 (1962).

REASONS FOR GRANTING THE WRIT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT A LIMITATION UPON A REVENUE TAX

A. The Due Process Clause Does Not Limit the Discretionary Power of a Legislative Body To Select the Rate of a Revenue Tax Even Though an Industry May Be Harmed Thereby

The holding of the majority of the Supreme Court, invalidating the parking tax as violative of the due process clause of the fourteenth amendment, conflicts with the consistent holdings of this Court that the due process clause is not an impediment to the Legislature's power to impose any rate of taxation that the Legislature, in its wisdom, sees fit to levy for general revenue purposes.

It would be difficult to improve upon the formulation unanimously set forth by this Court when it sustained the 15 cents per pound excise tax on butter substitutes in *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934). That case, upon which both the majority in the Commonwealth Court (A. 65a) and the dissenters in the Supreme Court (A. 30a) relied heavily, held that the due process clause is a limitation upon a taxing statute only when the statute is not really a tax at all:

> "Except in rare and special instances, the due process of law clause contained in the Fifth Amend-

ment is not a limitation upon the taxing power conferred upon Congress by the Constitution. Brushaber v. Union Pac. R. Co., 240 U.S. 1, 24. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. French v. Barber Asphalt Paving Co., 181 U.S. 324, 329; Heiner v. Donnan, 285 U.S. 312, 326. That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. Compare McCulloch v. Maryland, 4 Wheat. 316, 423; Child Labor Tax Case, 259 U.S. 20, 37, et seq.; McCray v. United States, 195 U.S. 27, 60; Brushaber v. Union Pac. R. Co., supra, 240 U.S. 24-25; Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 614-615; Nichols v. Coolidge, 274 U.S. 531, 542. Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. McCray v. United States, supra, 195 U.S. 56-59."

In that case, the appellant company had ceased to make intrastate sales, claiming that the tax was prohibitive. Yet this Court, conceding that to be the case, nonetheless held that the tax did not violate the due process clause, citing several earlier cases to the same effect:

> *"Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may*

or will result in restricting or even destroying particular occupations or businesses (Citizens' Sav. & Loan Association v. Topeka, 20 Wall. 655, 663-664; McCray v. United States, supra, 195 U.S. 56-58; and authorities cited; Alaska Fish Co. v. Smith, 255 U.S. 44, 48, 49; Child Labor Tax Case, supra, 259 U.S. 38, 40-43), unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state. The present case does not furnish such a demonstration.

"The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the validity of the 10 per cent tax imposed upon the notes of state banks involved in Veazie Bank v. Fenno, 8 Wall. 533, 548. This Court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments." (Emphasis added.)

In dictum in *Magnano* this Court recognized that "in rare and special instances" a purported taxing statute could involve not an exertion of the taxing power, but the exertion of a different and forbidden power such as the confiscation of property. The majority in the court below seized on this language (A. 19a; 21a) in *Magnano* while ignoring the factual situation involved there, the acknowledged destruction of the business, which was held not to be a confiscation of property.

The question of whether a taxing measure is not really a taxing measure but confiscation cannot be answered by looking to the rate. If that were the case, *Magnano* would have been decided differently. A different result would also have been reached in *Alaska Fish Co. v. Smith*, 255 U.S. 44, 48 (1921), where this Court, speaking through Justice Holmes, upheld an Alaska statute levying a heavy tax upon persons manufacturing fish oil against the contention that it would confiscate the plaintiffs' business. This Court held:

> "Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk."

Whereas the Pennsylvania Supreme Court has struck down this tax as "excessive and unreasonable" (A. 20a), this Court has held that the fourteenth amendment does not prohibit a tax merely because it is unwise, unfair, or burdensome. *Harvester Co. v. Dept. of Taxation*, 322 U.S. 435, 444 (1944).

The lesson of *Magnano* and *Alaska Fish Co.*, is that it takes more than a high rate to prove that a tax is not really a tax but a confiscation. This teaching the majority in the court below ignores. As stated by Justice Eagen in dissent (A. 31a):

> "The majority opinion does not indicate this taxing statute qua taxing statute is invalid, or the taxing measure 'does not involve an exertion of the taxing power,' which are the guidelines established by the Supreme Court of the United States. Rather, the majority opinion focuses on the tax rate and its

enforcement, and I view this as error. It is one thing to say a taxing statute is arbitrary and beyond the reach of the taxing power of the legislative branch, a point I do not contest, but it is quite another to say the exercise of the lawful taxing power is a violation of due process of law because of a high tax rate."

There is not a scintilla of evidence in the record of this case that the City wants to accomplish anything more in raising its parking tax 5% than to obtain additional revenue. The tax has been successful in raising revenue. Respondents' Exhibit 3 in this case shows that the 15% tax, enacted in 1968 for the year 1969, and never challenged in the courts, brought in over two million dollars in revenue for that one year. The 1970 tax, which is being paid, is exactly the same tax as the 1969 tax, except for a 5% increase in rate (A. 8a) required to augment the City's revenue to cover costs of inflation.

This tax did not, like Athena, spring full-grown from the head of Zeus. Rather, it is built upon the foundation of the earlier taxes, identical except as to rate since the year 1962 (A. 8a). The 10% tax had been sustained against constitutional challenge by the Supreme Court of Pennsylvania in *McGillick v. Pittsburgh*, 415 Pa. 581, 203 A. 2d 480 (1964), while Philadelphia's similar 10% gross receipts parking tax had been sustained, specifically against charges that it was confiscatory, in *Philadelphia v. Eglin's Garages, Inc.*, 342 Pa. 142, 19 A. 2d 845 (1941) and *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940).

The fact that the tax raises revenue "obliterates any question of lack of due process." *Shapiro v. City of New*

York, 325 N.Y.S. 2d 787, 794, 67 Misc. 2d 1021 (1971), citing *Magnano* in sustaining a tax on professionals' earnings against a due process challenge.

In fact, even if the City had another purpose in addition to its revenue purpose, the fact that the tax raised revenue immunizes it from attack. This is so even if the revenue raised is negligible (not the case here) or the revenue purpose is secondary. *United States v. Sanchez*, 340 U.S. 42, 44 (1956).

B. The Rule That the Due Process Clause Does Not Limit a Revenue Tax Is Not Changed Where Government Competes With the Private Sector

---

The majority purports to distinguish *Magnano; Alaska Fish; McCray v. United States*, 195 U.S. 56 (1904); *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 34 (1916); and similar cases[4] on the basis that here an added element exists, making it a case of first impression —the element of competition from the taxing body.[5]

Justice Roberts cites no authority for his theory, save a law review article, Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964), and one Hawaii case, *Hasegawa*

---

[4] *Magnano* has most recently been cited with approval by this Court in *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). See also, *Bode v. Barrett*, 344 U.S. 583, 585 (1953).

[5] As noted in footnote 3, supra, the competition does not come from the taxing body. For the purposes of this first reason for granting the writ, however, it will be assumed *arguendo* that the characterization of the majority of the Pennsylvania Supreme Court was correct.

v. Main Pineapple Co., 52 Hawaii 327, 475 P. 2d 679 (1970). The theory enunciated in the former, by title and by content, deals not with taxation but with the police power, and is, by the author's own admission, inconsistent with numerous decisions of this Court. *See*, e.g., *U. S. v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), where this Court held that a government order shutting down private gold mines so that workers would be available for service in copper mines to produce ore necessary for the Government's war effort was not a compensable taking.

As pointed out in Justice Pomeroy's dissent at footnote 3 (A. 41a), the *Hasegawa* case retains no semblance of validity after the decision of this Court in *Dean v. Gadsden Times Publishing Co.*, U.S. , 93 S. Ct. 2264 (1973).

Justice Roberts is simply incorrect in his assertion that the competition aspect makes this a case of first impression.

The fact of the matter is that on several occasions this Court has been faced with almost identical situations, where the taxing body was competing with the taxed industry.[8] This issue, resurrected by the court below, was

[8] The attempt of the majority below to carve out an exception to the *Magnano* doctrine is not only inconsistent with the holdings of this Court, but also, it is submitted, evidences an unfortunate view of government as an entity apart from the people. The tax in *Magnano* aided the butter industry at the expense of the margarine industry to the point of eliminating the latter. Yet neither the majority below nor Professor Sax would hold that confiscation occurred there because, rather than favoring the

first decided by this Court over a century ago in *Veazie Bank v. Fenno*, 75 U.S. 482, 8 Wall. 533 (1869). There a 10% tax was imposed by Congress on the notes of state banks. This was in addition to other taxes aggregating 6% on state banks, for a total of a 16% tax. 75 U.S. at 488, 489 (dissenting opinion). As noted in the dissenting opinion, 75 U.S. 488, 490, the purpose of the tax on state bank notes was to foster the national banks at the expense of the state banks.

Nonetheless, despite the competition aspect, the Court sustained the tax against a confiscation argument such as is made here, holding, 75 U.S. at 487-8:

> "It is insisted, however, that the tax in the case before us is excessive and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the Bank, and is, therefore, beyond the constitutional power of Congress.
>
> "The first answer to this is that the Judicial cannot prescribe to the Legislative Departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsi-

---

government operation over the private industry, the tax favored another private industry.

Yet it would seem to be exalting form over substance to distinguish the situation where the governmental body effects the will of the people through a tax favoring the butter industry from that where it accomplishes its goals by creating a governmental agency.

Carried to the logical conclusion, the holding below would prevent any taxation whatsoever, for by its very nature, taxation favors one segment of society over another.

bility of the Legislature is not to the courts but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

A second case directly in point is *Puget Sound Co. v. Seattle*, 291 U.S. 619 (1934). There a power and light company alleged a taking of property without due process because the City imposed a gross receipts tax upon it while both the company and the City were "engaged and actively *compete*[*d*] in the business of furnishing electric light and power to consumers for hire." (Emphasis added.) 291 U.S. at 621. This Court held that the due process clause does not prevent such competition. It pointed out that what the private company was actually seeking, as are respondents here, is insulation from competition, and the due process clause does not provide such protection.

"The injury, which appellant fears may result, is the consequence of competition by the city, and not necessarily of the imposition of the tax. Even without the tax the possibility of injury would remain, for the city is not bound to conduct the business at a profit. The argument that some way must be found to interpret the due process clause so as to preclude the danger of such an injury fails to point the way. Legislation may protect from the consequences of competition, but the Constitution does not. Helena Water Works Co. v. Helena, supra; Vicksburg v. Henson, 231 U.S. 250. The Fourteenth Amendment does not purport to protect property from every injurious or oppressive action by a state,

Memphis Gas Co. v. Shelby County, 109 U.S. 398, 400; St. Louis v. United Railways Co., 210 U.S. 266, 276, nor can it relieve property of congenital defects, Madera Water Works v. Madera, supra, 456. It does not preclude competition, however drastic, between private enterprises or prevent unequal taxation of competitors who are different. Those were risks which appellant took when it entered the field. No articulate principle is suggested calling for the conclusion that the appellant is not subject to the same risks because the competing business is carried on by the state in the exercise of a power which has been constitutionally reserved to it from the beginning.

"Such was the decision in Madera Water Works v. Madera, supra, where this Court pointed out that, in the absence of any contract restriction the Fourteenth Amendment does not prevent a city from conducting a public water works in competition with private business or preclude taxation of the private business to help its rival to succeed."

In *Jayne v. City of Detroit*, 348 U.S. 802 (1954), this Court reached the same result in a case involving municipally-owned parking facilities. In that case, the private parking operators filed suit in the Wayne County Circuit Court alleging that Detroit's ordinances providing for construction of off-street parking garages violated, *inter alia*, the due process clause of the fourteenth amendment by creating "unlawful and unfair competition with appellants' parking businesses." (Statement as to Jurisdiction, pp. 5-6.) This argument was rejected on its merits by the Supreme Court of Michigan which treated a prohibition action against the Circuit Court judges as a kind

of demurrer. (Statement as to Jurisdiction, Appendix "A", pp. 25-26.) On appeal to this Court, Detroit relied on *Puget Sound, supra,* and other similar cases. This Court determined that the situation which the Pennsylvania Supreme Court held to deprive respondents of due process of law did not even present a substantial federal question, and the appeal was dismissed for that reason.

In *Gate City Garage v. City of Jacksonville,* 66 So. 2d 653, 660 (Fla., 1953), the Court stated:

> "There may be public hospitals, waterworks, electric light plants, and other enterprises acquired and operated primarily for the benefit of the public and there may also be private hospitals, waterworks, and electric light plants operated primarily for private profit and private gain. When the Legislature authorizes a particular undertaking, such as, the parking system involved in this case, and it is found and determined that such system primarily serves a public and municipal purpose, it is not a valid objection that the municipality will be engaged in competition with private business. . . .
>
> "We find no provision of the State or Federal Constitutions which prohibits a municipal corporation to acquire, own and operate a system such as that involved in this case because it may be in competition with private individuals, firms and corporations."

See also, Bowman v. Kansas City, 361 Mo. 14, 233 S.W. 2d 26 (1950), also sustaining the right of the city to establish parking garages that compete with private industry.

As indicated by this Court in *Puget*, the private operator would be in the same situation if there were no tax at all, and the public operation were run at a loss and subsidized with public funds. The majority below admits that a high rate per se cannot invalidate a tax. *Puget* holds clearly that competition from a public body does not warrant relief to a private operator. The tax is proper; competition is proper. The majority below holds that two rights make a wrong.

C. Requiring Government Either To Forego Levying Taxes or To Forego Providing Services in the Myriad Areas Where Government and the Private Sector Compete Will Be Disastrous

---

The decision below is not only inconsistent with the holdings of this Court, but it is also profoundly inconsistent with the structure of government as we know it. The decision below, if allowed to stand, threatens to destroy the ability of government to serve the public.

The consequence of the holding below is to deny public bodies the right to provide badly-needed services in areas where the private sector is involved, unless government forfeits its right to tax the private sector.

Can it be that in an area where government-supported public transit exists and necessarily competes with private bus, street railway, taxi, and railroad companies, as well as private parking garages and lots, a governmental body may no longer levy the rate of tax its legislature finds necessary for it to discharge its obligations?

Likewise, where the government provides low cost housing, must it compensate all landlords whose competitive position has declined? Although privately-owned airports seldom have the resources sufficient to construct runways large enough for jet airplanes, does the building of a government-operated airport prevent taxation of private airports? Must government forego taxation of private ferry operators at the rate it deems necessary, when it builds a bridge? Is a state constitutionally forbidden to tax a private school because it operates a public school system? The list can be multiplied endlessly. Under the decision below, government will be required either to forego levying taxes or to forego providing services in such areas as: utility services, including electricity, water, sewage, and garbage disposal; recreational services such as municipal stadiums, parks, swimming pools, golf courses, ski slopes and cultural programs; and educational services and facilities of all types.

It is respectfully submitted that competition between government and the private sector permeates our society. It has existed, particularly in education, almost since the founding of the country. To require government to forego taxation of private persons at the rate its legislative body deems wise merely because it is in competition with the taxpayer will cripple government.

D. The Decision Below Violates the Separation of Powers Doctrine, With Dire Consequences for Judicial Caseloads

---

If allowed to stand, the holding of the court below, in addition to depriving one of our hard-pressed urban

areas of millions of dollars of needed revenue and causing a chilling effect on government activities, will also create a devastating crisis in the courts. At a time when this Court and most courts throughout the country are inundated with work, the court below would abjure the wisdom of Chief Justice Marshall and open up the floodgates to a possible tidal wave of litigation attacking taxes as being too high.

In *McCulloch v. Maryland*, 4 Wheat. 316, 428 (1819), Chief Justice Marshall, for the Court, stated:

> "[T]he power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.
>
> "The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse."

Justice Eagen in his dissent (A. 34a) has properly condemned this intrusion on legislative power:

> "The most troublesome aspect of the rationale adopted by the majority opinion is that by considering

the tax rate, it is taking on a non-judicial function, and in effect sitting as a legislative body. This approach strikes at the heart of the principle of separation of powers and is, therefore, contrary to constitutional doctrine. The sum and substance of the majority's opinion is: the tax rate is too high for the garage owners to make a substantial profit; hence, the tax is unjust and must be struck down. However, the wisdom of a tax rate is strictly for the legislative branch, and for this Court to strike a tax down because of a high rate is to usurp a legislative power. Moreover, by so doing this Court has to go beyond its own power and exercise the usurped power in an arbitrary fashion by substituting its concept of public policy, or wisdom, for that of the Legislature."

If other courts follow the example of the court below,[7] it is difficult to see an end to the litigation that would be engendered. If there is one thing upon which practically all Americans can agree, it is that taxes are higher than they would like them to be. If this visceral reaction can be translated into lawsuits requiring courts to determine whether taxes are too high, the courts will have time for little else.

Since *McCulloch v. Maryland, supra,* this Court has been steadfast in preventing judicial encroachment upon the legislative power to tax. In *Veazie Bank v. Fenno, supra,* this Court held:

---

[7] The case has received wide publicity, being reported at 42 LW 2062, and being the subject of an article in the Wall Street Journal of July 11, 1973. Probably hundreds of municipalities impose parking taxes, while themselves operating parking facilities. In addition, there are the myriad ways noted above in which governmental and private operations compete.

> "The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

See also, McCray v. United States, 195 U.S. 27 (1904) and *Fox v. Standard Oil Co.,* 294 U.S. 87, 89 (1935), in the latter of which Justice Cardozo noted:

> "When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers."

This Court stated in *Stewart Dry Goods Co. v. Lewis,* 294 U.S. 525 (1935) at 563:

> "Once the lawfulness of the method of levying the tax is affirmed, the judicial function ceases." 294 U.S. at 563.

It is respectfully submitted that the court below has erred in extending the judicial function far beyond the limits set by this Court. In so doing, it makes the courts into the "super-legislatures" which this Court has often held they should not be. *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965). Petitioner urges this Court to grant the writ of certiorari to restore the proper balance between the judicial and the legislative branches of government.

II. ASSUMING ARGUENDO THAT A HIGH TAX RATE COMBINED WITH COMPETITION FROM THE TAXING BODY COULD IN A PROPER CASE BE CONSIDERED CONFISCATORY, PLAINTIFFS HAVE NOT PROVEN CONFISCATION HERE

Viewing the record in a light most favorable to respondents, we find that they have proved only one thing —unprofitability [8] for a six-month period and a projected unprofitability for six months more. Under no circumstances can mere unprofitability be considered a confiscation of respondents' property.

The majority below admits that, to prove confiscation, a party must ordinarily show both that the industry is being forced out of business and that the tax cannot be passed on to the customer. The first test was met here, says the majority, and the second, if not met directly, was satisfied inferentially because with the competition from the allegedly lower-priced "taxing body", an increase in

[8] As Justice Pomeroy noted in footnote 6 (A. 43a), respondents' evidence on unprofitability is most suspect. He states, among other things, that respondents' "expert" witness was an electrical engineer, that there was no showing of what respondents' net profits were (see Finding No. 18, A. 89a), and that there was no showing of what portion of the operating expenses were salaries to the owners and what portion of the salaries really represented return on investment. This apportionment would be significant, as seven of the twleve respondents are owned or controlled by one man, John T. Stabile (R. 212a).

Other portions of the Record also cast great doubt on the unprofitability of respondents' operations. For example, the chancellor found (Finding No. 17, A. 89a) that some of respondents' garages were not included in Exhibit No. 1, and thus that the projection was distorted.

rates by respondents would simply have increased the disparity between their rates and those of the "taxing body."

Justice Pomeroy pointed out in dissent (A. 41a) that a review of the record will show clearly that neither of these conclusions is supported by the evidence. This Court noted in *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), that its duty is not limited to the elaboration of constitutional principles, but it also must in proper cases review the evidence to see that those constitutional principles have been constitutionally applied. In *Fiske v. Kansas*, 274 U.S. 380, 385-6 (1927), this Court stated:

> "[T]his Court will review the findings of fact by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

Such is the situation here.

Consider first the majority's conclusion that the tax was forcing respondents out of business. The most obvious refutation of this is the fact that none of the respondents was out of business at the time of trial (A. 98a) and all are still in business (A. 43a). Moreover, even if respondents had gone out of business, the parking tax could not have been the cause. Respondents' receipts, *after the tax*, have either increased or remained stable when the tax rate was increased, higher labor costs and other operating expenses being the cause of respondents' predicament. The fact that many in this industry allegedly cannot make a profit for a short period of time proves nothing. Many industries are in a like situation, and a 5% increase in a gross receipts tax surely cannot be the culprit for all of them.

The majority below erred grievously in determining that the competition of the taxing body prevents the tax from being passed on to the consumer. In the first place, Ordinance No. 704 of 1969 by its terms imposes the tax on the Parking Authority, and at the time of trial, the Parking Authority was paying the tax.[9]

It is true that the Authority is exempt from real estate taxes and can borrow money at lower rates than can respondents.[10] This advantage is common to every gov-

---

[9] As set forth in footnote 9 (A. 21a) of the majority opinion, the Court of Common Pleas of Allegheny County has ruled that the Parking Authority is exempt from this tax. *Public Parking Authority of Pittsburgh v. City of Pittsburgh*, No. 687 July Term, 1972. An appeal by the City is pending.

It should be noted that the Authority has always acknowledged its liability for the tax, was joined as a party plaintiff without its permission, and filed a petition to strike it as a named plaintiff. The real plaintiffs in the case are some of the same parties as the respondents in this case.

Thus, respondents' lament that they are unable to raise their rates because of competition from the Parking Authority which need not pay the parking tax, even if true, is the classic definition of *chutzpah*: the man who, having murdered his parents, begs mercy from the court because he is an orphan.

Any harm resulting to respondents from the Parking Authority's not paying this tax is self-inflicted. For the Parking Authority to pay the tax to the City is not a mere paper transaction as the court below states (A. 21a). As noted previously, the Parking Authority is a separate entity from the City of Pittsburgh, which is the taxing body. The Authority has fiduciary obligations to its bondholders, and is obliged to maximize its income so as to pay its bonds.

[10] It is also true, however, that the real advantages of the Authority garages is that they are more convenient, resulting in

ernmental operation and consistent with the equal protection clause of the fourteenth amendment, *Puget Sound Co. v. Seattle, supra.* The extent of this advantage translated into parking rates, nowhere appears in the record.[11]

---

higher patronage, and more efficient, being self-service whereas most of respondents' operations are attendant-operated, with resulting higher labor costs. At R. 660a, the study made for the Parking Authority states:

> "Self-parking characterizes the Authority garages, while the other public facilities continue to be almost entirely attendant-operated."

Thus respondents' statement in their Answer to Petition for Reargument below that "the City's allegation, at page 5 of its Petition for Reargument, that the Public Parking Authority's rates are lower because its garages are self-service is likewise entirely without basis on the record" is absolutely incorrect.

[11] In fact, the record shows that, while some of the Authority rates are lower than respondents, some are higher. The majority is simply incorrect in its assertion that Authority rates are lower.

In at least five places in the majority opinion, Justice Roberts refers to the "lower rates" of the Parking Authority. In particular, the opinion notes (A. 14a):

> "For example, the record establishes that the average all day rate for the Public Parking Authority is about $2.00, while the average all day rate for private operators is approximately $3.00."

Justice Roberts used this alleged disparity in rates to show the inability of the operators to pass the tax on to the patrons (A. 17a):

> "Clearly if the private parking lot operators attempted to pass the full burden of the tax on to the consumers they would only succeed in increasing the disparity in the already disparate rates. For example, at the all day rates shown in the record, if appellants were to attempt to pass the tax on to their patrons, their rates would increase from an average

Yet even if Authority rates were consistently lower than respondents', they would not prevent respondents from passing the incidence of the tax on to consumers. As pointed out in Part III of Justice Pomeroy's dissent (A. 46a), the majority ignores elementary economics. It is undisputed that there is an unsatisfied demand for 4100 parking spaces in downtown Pittsburgh (A. 47a; 87a; R. 641a). Respondents' own Exhibit 11, Table 4, shows that facilities open to the public in the central business district, exclusive of Authority garages, are 99.2% occupied at 2:00 p.m. on a typical weekday, and all facilities open to the public, including Authority garages, are at that time 102.9% occupied. Justice Pomeroy succinctly states (A. 47a):

> "... an entrepreneur (the appellants) who controls 71% of the supply in a market of unsatisfied demand need not concern himself with a low-cost competitor (the Parking Authority) who controls 29% of the supply, has no excess capacity, and can-

---

of $3.00 to $3.60, while a similar tax pass-on by the Public Parking Authority would increase their average rate from $2.00 to $2.40. Thus the differential in rates would increase from $1.00 to $1.20."

The fact is, however, that the assertion that the all-day rate is $2.00 for the Authority and $3.00 for the private operators is nowhere supported by the record, and is simply incorrect. *The record reveals that the Authority's all-day rate is higher than the private operators!* Respondents' own expert testified that the Authority's average nine-hour rates were $2.56, compared with $2.37 for private operators. (R. 341a). Since most parkers in the downtown area park for long periods of time, the average being close to six hours (R. 615a), the Parking Authority garages are more expensive for the bulk of consumers.

not service demand which the 71% competitor might drive away through price increases."

* * * * * * * *

"The presence of the Parking Authority in this picture, and its preferred status in terms of property taxes, is therefore in my view an irrelevant factor."

The actual experience of the industry supports the economic analysis above. General rate increases in the past have always resulted in an increase in gross receipts (A. 45a). The City experienced only a temporary reduction in the number of cars parked at its facility on the Wharf after it doubled its price for parking. Moreover, as can be seen from the Appendix to Justice Pomeroy's opinion (A. 49a), current rates are significantly higher than those which respondents sought to characterize as profit-maximized. Reality corresponds with theory: the Parking Authority cannot and has not prevented respondents from passing tax increases on to consumers.

Therefore, even if we accept the argument that a high rate plus public competition constitutes a denial of due process, that situation does not exist here.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the decree of the Supreme Court of Pennsylvania.

Respectfully submitted,

GRACE S. HARRIS,
Special Assistant City Solicitor

Of Counsel:
RALPH LYNCH, JR.,
City Solicitor

OCT 1 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1973
No. 73 582

CITY OF PITTSBURGH, *Petitioner*

vs.

ALCO PARKING CORPORATION; ARENA PARKING, INC.; CAMPUS PARKING, INC.; FOURTH AVENUE PARKING, INC.; GRANT PARKING, INC.; HARRY W. SHEPPARD, JR., t/a Stanwix Auto Park; JOHN COMINOS, t/a Liberty Parking; JOHN STABILE and ROCCO A. DEL SARDO, t/a Wm. Penn Parking Lot; K-SEVEN PARKING COMPANY; MEYERS BROS. PARKING—CENTRAL CORP.; PARKING SERVICE CORPORATION, INC.; WM. PENN PARKING GARAGE, INC.,

Respondents

APPENDIX TO PETITION OF THE CITY OF PITTSBURGH FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

GRACE S. HARRIS,
Special Assistant City Solicitor,
313 City-County Bldg.,
Pittsburgh, Pa. 15219,
Attorney for Petitioner.

Of Counsel:
RALPH LYNCH, JR.,
City Solicitor.

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840
Harry Haas, Pittsburgh Representative, Tel. 421-4723

INDEX TO APPENDIX

	PAGE
Opinion of the Supreme Court	1a
Order of the Supreme Court	50a
Opinions of the Commonwealth Court	51a
Opinion of the Court of Common Pleas ..	78a
Final Decree	83a
Adjudication of the Court of Common Pleas	84a
Decree Nisi	102a
Ordinance No. 704	103a

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

No. 90 March Term, 1973

Alco Parking Corporation; Arena Parking, Inc.; Campus Parking, Inc.; Fourth Avenue Parking, Inc.; Grant Parking, Inc.; Harry W. Sheppard, Jr., t/a Stanwix Auto Park; John Cominos, t/a Liberty Parking; John Stabile and Rocco A. Del Sardo, t/a Wm. Penn Parking Lot; K-Seven Parking Company; Meyers Bros. Parking-Central Corp.; Parking Service Corporation, Inc.; Wm. Penn Parking Garage, Inc.,

Appellants

v.

City of Pittsburgh

Appeal from Decree of the Court of Common Pleas of the County of Allegheny, Pennsylvania at No. 1699 April Term, A.D. 1970 and the Order of the Commonwealth Court of Pennsylvania at No. 643 C.D., 1971.

OPINION OF THE COURT

Opinion by Mr. Justice Roberts, July 2, 1973:

This controversy presents the interesting and novel question of whether the enactment, by a municipal gov-

ernment, of a 20 percent gross receipts tax upon all non-residential, commercial parking facilities in that municipality, combined with direct governmental competition in the form of a public parking authority, charging lower rates, has resulted in an unconstitutional taking and confiscation of private property without due process of law.

Appellants are twelve owners and operators of parking lots and garages representing approximately 71 percent of the total commercial parking spaces in downtown Pittsburgh. On February 20, 1970, appellants filed a complaint in equity in the Allegheny County Court of Common Pleas seeking to restrain the City of Pittsburgh (appellee) from enforcing the provisions of Ordinance No. 704 (Parking Tax Ordinance), and seeking a refund of all taxes paid thereunder. The Parking Tax Ordinance, approved by the Pittsburgh City Council on December 31, 1969, and enacted pursuant to the Local Tax Enabling Act, Act of December 31, 1965, P. L. 1257, §§1 et seq., 53 P.S. §§6901 et seq., imposed a tax of 20 percent on the gross receipts of all non-residential commercial parking transactions within the city limits.

This Parking Tax Ordinance (No. 704) superseded and replaced Ordinance No. 675, enacted by the City of Pittsburgh in 1968 establishing a gross receipts tax of 15 percent on all non-residential commercial parking transactions in the city. Ordinance No. 675, in turn, had replaced Ordinance No. 434, which had originally established the gross receipts tax rate of 10 percent.

In their complaint in equity appellants asserted (1) that the Parking Tax Ordinance was so excessive and unreasonable that it amounted to a confiscation of appellants' property without due process of law, and (2) that

the Ordinance violated Article VIII, Section 1 of the Pennsylvania Constitution,[1] and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in that the city had no reasonable basis for separately classifying appellants' commercial parking operations for the purpose of taxation. After a trial the Allegheny County Court of Common Pleas issued a Decree Nisi, on March 19, 1971, dismissing appellants' complaint, having found no taking of property without due process, and no violation of either the Pennsylvania or the United States Constitutions. Appellants' timely filed exceptions to the decree were dismissed by the court en banc on July 11, 1971, whereupon a final decree was entered.

Appellants then appealed to the Commonwealth Court which affirmed the decree of the common pleas court on June 8, 1972, by a vote of four to three. Appellants' petition for reargument was granted by the Commonwealth Court on June 29, 1972. However, after reargument the Commonwealth Court adhered to its prior decision, affirming the chancellor's decree on October 10, 1972. Subsequently, on November 6, 1972, appellants filed a petition for allowance of appeal with this Court. That petition was granted on January 23, 1973. We now reverse and remand.

I.

Appellee, the City of Pittsburgh, contends, initially, that this Court lacks jurisdiction to hear this appeal be-

---

[1] "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax and shall be levied and collected under the general laws." Constitution of Pennsylvania, Article VIII, Section 1.

cause appellants' petition for allowance of appeal was not timely filed. See *Nardo v. Smith*, 448 Pa. 38, 292 A. 2d 377 (1972). Consequently appellee has moved to quash this appeal. In its motion to quash appellee alleges that appellants' petition for allocatur was not filed until November 6, 1972, almost five months after the issuance of the final order and opinion of the Commonwealth Court of June 8, 1972—clearly not within the 30-day time limit for perfecting an appeal as provided by statute. See Act of July 31, 1970, P. L. , art. V, §502, 17 P.S. §211.502 (Supp. 1972).

Appellee's contention is that the grant of the petition for reargument by the Commonwealth Court on June 29, 1972 (within the 30-day appeal period), unless accompanied by an order staying the proceedings, does not toll the 30-day period within which appellants must file their appeal. See *Francis v. J. A. Brashear M. School Dist.*, 435 Pa. 589, 258 A. 2d 509 (1969); *Smith v. Jones*, 369 Pa. 13, 85 A. 2d 23 (1951); *Erie v. Piece of Land*, 341 Pa. 310, 17 A. 2d 399 (1941). Since no such specific stay of the proceedings was issued by the Commonwealth Court, appellee asserts that the time for perfecting the appeal expired 30 days after the original June 8, 1972 order of the Commonwealth Court, regardless of that court's grant of reargument within the 30-day period.

Appellants contend that in good faith, after reargument had been granted, they contacted the Prothonotary of the Supreme Court who advised them that a petition for allocatur should not be filed until after the Commonwealth Court's order, following reargument, had been entered. Relying upon this information appellants did not file their petition until November 6, 1972—a date within

30 days of the Commonwealth Court's order, after reargument, affirming the decree below.

While appellants may not have been justified in relying on the legal advice of a court official, nevertheless the rule of law urged upon this Court by the appellee is not only contrary to logic but to the laws of physics as well. The granting of a petition for reargument within the 30-day appeal period necessarily indicates an intention by the granting court to stay the proceedings, and is in reality such a stay, in order to keep the record before that court, during reargument, pending any change or modification of the court's initial order after reargument. In these circumstances to require appellants to file a petition for allowance of appeal within 30 days of the original order of the Commonwealth Court would have the effect of placing them in two courts at the same moment. It is legally and physically impossible for the record in any case to be pending before two separate appellate courts of this Commonwealth simultaneously. Indeed, a reargument is clearly a reconsideration by a court of a particular case. To slavishly adhere, as the appellee insists, to a rule requiring a court to also issue an order staying the proceedings would be needlessly elevating mere form over substance.

Certainly it is illogical, as well as senseless, to require a litigant to file an appeal, or petition for allowance of appeal, to a second appellate court while his case is still pending before the first appellate court, about to reconsider his case. To compel him to do so in advance of the reargument is indeed a useless, wasteful, and premature procedure. Assuming the court's initial decision is reversed upon reargument, the litigant may not even desire

to file an appeal at the later time. If an appeal is desired after the reargument, that is the appropriate time for setting the appeal procedure in motion. This Court will not mandate such a purposeless burden and expenditure of professional and judicial time and effort.

These considerations lead us inexorably to the conclusion that where, as here, the Commonwealth Court granted appellants' petition for reargument within the prescribed period, the proceedings were thereby stayed, pending a reconsideration upon the merits after reargument. Appellants' petition, filed within 30 days of the Commonwealth Court's post-reargument disposition, was therefore timely. The motion to quash the appeal is denied. To the extent that any prior decision of this Court are inconsistent with this holding they are no longer controlling.

II.

Appellee urges upon this Court, one additional procedural objection contending that the Allegheny County Court of Common Pleas sitting in equity was not the proper court to hear this case. Appellee urges that a proceeding in equity is only proper in challenges to taxing statutes or ordinances when there is "a substantial question of constitutionality . . . and the absence of an adequate statutory remedy." *Rochester and Pittsburgh Coal Co. v. Indiana County Board of Assessment*, 438 Pa. 506, 266 A. 2d 78 (1970).[2] The City of Pittsburgh argues

[2] Even if appellee could raise this issue here for the first time (see text, p. a, infra), its reliance upon *Rochester and Pittsburgh Coal Co. v. Indiana County Board of Assessment*, 438 Pa. 506, 266 A. 2d 78 (1970), appears to be somewhat misplaced. The

that the issues raised by appellants are not "substantial constitutional questions" and that appellants had a specific statutory remedy of which they failed to avail them-

---

seminal case on the question of equity jurisdiction to hear challenges to tax legislation under the Local Tax Enabling Act, (Act of December 31, 1965, P. L. 1257, §6, as amended, 53 P.S. §6906), is *Lynch v. Owen J. Roberts School District*, 430 Pa. 461, 244 A. 2d 1 (1968). In *Lynch* this Court held that while normally equity is without jurisdiction to enjoin enforcement of a tax not challenged at law under the applicable statute, an exception exists "where a taxing statute is made the subject of a *constitutional* challenge." Id. at 465, 244 A. 2d at 3.

Rochester, decided two years later, apparently effected a sub silentio modification of *Lynch* by holding that equity only has jurisdiction when there is "a substantial question of constitutionality (and not a mere allegation) and the absence of an adequate statutory remedy." *Rochester*, supra at 508, 266 A. 2d 79. However, *Rochester* appears to have distinguished itself as sui generis. The majority there acknowledged that a different rule was necessary because, unlike *Lynch*, *Rochester* involved a real estate tax. The majority felt in those real estate tax situations it would be preferable for an administrative body with some expertise, such as the board of assessment, to assume jurisdiction rather than an equity court. *Rochester*, supra at 509, 266 A. 2d at 79.

Moreover, in *Crosson v. Downington Area School District*, 440 Pa. 468, 475, 270 A. 2d 377, 380 (1970), this Court, while not returning completely to the preferable rule of *Lynch*, at least modified *Rochester* in holding that even "'[w]here there is an adequate remedy at law in this class of use, this Court has repeatedly said that *Equity should intervene only where there is . . . an* utter disregard of imperative constitutional requirements: [citations of authorities].'" (Emphasis in original.) See also *Campbell v. Coatesville Area School District*, 440 Pa. 396, 270 A. 2d 385 (1970).

selves. See Local Tax Enabling Act, Act of December 31, 1965, P. L. 1257, §6, as amended, 53 P.S. §6906.[3]

However, appellee did not raise this issue below and may not raise this issue here for the first time. The record clearly discloses that appellee interposed no objection to the propriety of the equity court proceeding either prior to, during, or after the trial below. In fact, one of the chancellor's express conclusions of law, to which appellee took no exception was: "This court sitting in equity has jurisdiction of the parties and of the subject matter of this proceeding." This Court has repeatedly emphasized, and it is now beyond cavil, that "we will not review questions

---

[3] It is not altogether clear that appellants could have proceeded under Section 6 of the Local Tax Enabling Act even had they so attempted. That section of the Act provides in pertinent part that: "No tax levied for the first time by any political subdivision to which this act applies shall go into effect until thirty days from the time of the adoption of the ordinance or resolution levying the tax. Within said thirty days, taxpayers representing twenty-five percent or more of the total valuation of real estate in the political subdivision as assessed for taxation purposes, or taxpayers of the political subdivision not less than twenty-five in number aggrieved by the ordinance or resolution shall have the right to appeal therefrom to the court of quarter sessions of the county upon giving bond with sufficient security in the amount of five hundred dollars ($500), approved by the court, to prosecute the appeal with effect and for the payment of costs." Act of December 31, 1965, P. L. 1257, §6, as amended, 53 P.S. §6906.

Certainly it is arguable whether Ordinance No. 704 merely raising the rate of a gross receipts tax already in existence since 1962, can be classified as "a tax levied for the first time," under the terms of this section. Secondly, assuming appellants in good faith were unable to muster the requisite 25 aggrieved taxpayers, they were then apparently foreclosed from challenging the tax under this statute and arguably had no statutory remedy.

that were neither raised, tried, or considered in the trial court." *Felte v. White,* Pa. , A. 2d (1973); *Heppe Estate,* 440 Pa. 328, 269 A. 2d 687 (1970); *Man O'War Racing Ass'n Inc. v. State Horse Racing Commission,* 433 Pa. 432, 250 A. 2d 172 (1969); *Brenner v. Sukenik,* 410 Pa. 324, 189 A. 2d 246 (1963); *Clark v. Rutecki,* 408 Pa. 25, 182 A. 2d 687 (1962); *Bechler v. Oliva,* 400 Pa. 299, 161 A. 2d 156 (1960); *Rosenfeld v. Rosenfeld,* 390 Pa. 39, 133 A. 2d 829 (1957).

III.

Proceeding to the merits of the case, appellants attack the constitutionality of the Parking Tax Ordinance on two grounds. They first contend that the Ordinance violates both the uniformity clause of the Pennsylvania Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Specifically appellants assert that the Ordinance "constitutes an arbitrary use of the taxing power by [Pittsburgh] City Council in that the imposition of a separate tax on the parking business, in additional to its regular taxes, lacks *any reasonable basis.*" Moreover, appellants contend that merely because the City could, under its police power, classify the parking business separately for regulatory purposes, it does not necessarily follow that they can separately classify the parking business for purposes of taxation.

This argument, presented to and rejected by this Court on numerous prior occasions, must, once again, be rejected. It is well-established that the Commonwealth and its political subdivisions, in the exercise of the taxing power, are subject to the requirements of equal protection

and uniformity. See *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S. Ct. 437 (1959); *Commonwealth v. Life Assurance Co. of Pa.*, 419 Pa. 370, 214 A. 2d 209 (1965). However, the taxing authority must by necessity possess wide discretion for purposes of taxation of various businesses or occupations. *Commonwealth v. Life Assurance Co. of Pa.*, supra at 376, 214 A. 2d at 214, and the cases cited therein.

In *Life Assurance Co.*, supra, this Court noted:

"The equal protection clause imposes no iron rule of equality prohibiting that degree of flexibility and variety appropriate to reasonable schemes of taxation. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 525, 79 S. Ct. 437, 440 (1959).

"The only constitutional limitation placed upon the power of the Legislature to distinguish between various entities for purposes of taxation is that their basis for doing so be reasonable. See *Allied Stores of Ohio, Inc. v. Bowers*, supra, at 527, 79 S. Ct. at 441; *State Bd. of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 537, 51 S. Ct. 540, 543 (1931); *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 572, 30 S. Ct. 578, 580 (1910); *Jones & Laughlin Tax Assessment Case*, 405 Pa. 421, 433-34, 175 A. 2d 856, 862 (1961); *Commonwealth v. Lukens*, 312 Pa. 220, 223, 167 Atl. 167, 169 (1933). And the burden of showing that the classification employed by the Legislature is not reasonable is upon the party attacking the tax. *Cf. Chartiers Valley Jt. Schools v. Allegheny County Bd. of School Dir's*, 418 Pa. 520, 546, 211 A. 2d 487, 501 (1965). 'Especially is this so in light of the often reaffirmed rule that . . . " '[legislation] will not be de-

clared unconstitutional unless it *clearly, palpably* and *plainly* violates the Constitution.'"' *Ibid.* (Citations omitted.)" Id. at 376-77, 214 A. 2d at 214.

Moreover, the burden of proving the classification is unreasonable is a heavy one. *Amidon v. Kane,* 444 Pa. 38, 51, 279 A. 2d 53, 60 (1971); *F. J. Busse Co. v. Pittsburgh,* 443 Pa. 349, 359, 279 A. 2d 14, 19 (1971); *Philadelphia v. Depuy,* 431 Pa. 276, 279, 244 A. 2d 741, 743 (1968). "So long as the classification imposed is based upon some standard capable of reasonable comprehension, be that standard based upon ability to produce revenue or some other legitimate distinction, equal protection of the law has been afforded." *Commonwealth v. Life Assurance Co. of Pa.,* supra at 378, 214 A. 2d at 215. Merely because "a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy. *American Sugar Refining Co. v. State of Louisiana,* 179 U.S. 89, 21 S. Ct. 43." *Allied Stores,* supra at 528, 79 S. Ct. at 441. Thus a tax based on a reasonable classification is not unconstitutional because one class may be placed at a competitive disadvantage. *Williams and Co., Inc. v. Pittsburgh School District,* 430 Pa. 509, 514, 244 A. 2d 37, 39 (1968).

The determinative question, then, is whether the classification imposed by the Parking Tax Ordinance is a reasonable one. We said in *Commonwealth v. Life Assurance Co. of Pa.,* supra at 378-79, 214 A. 2d at 215 that: ". . . the essential question in testing the validity of such measures . . . is whether the distinctive treatment accorded rests upon substantial differences between the subjects so classified. . . . And where such distinctions

rest upon differences recognized and acted upon by the business world, it is not within the province of the courts to intrude. . . . So long as the classification is neither capricious nor arbitrary, there is no denial of the equal protection of the law. . . ." (Citations omitted.)

This Court has in the past sustained numerous types of distinctive tax treatment of a wide diversity of businesses and occupations. See, e.g., *Commonwealth v. Lafferty*, 426 Pa. 541, 233 A. 2d 256 (1967) (contract carrier taxed differently from common carrier although engaged in similar enterprises); *Allentown School District Mercantile Tax Case*, 370 Pa. 161, 87 A. 2d 480 (1952) (retailers and wholesalers taxed differently); *DuFour v. Maize*, 358 Pa. 309, 56 A. 2d 657 (1948) (strip mining of coal taxed differently than deep mining of coal). Moreover, in 1940, this Court sustained the validity of a Philadelphia ordinance which distinguished open parking places from closed garages for the purpose of taxation. *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940); see also *McGillick v. City of Pittsburgh*, 415 Pa. 581, 203 A. 2d 481 (1964); *Philadelphia v. Eglin's Garages, Inc.*, 342 Pa. 142, 19 A. 2d 845 (1941).

Commercial parking lots are without question a proper subject for local, municipal taxation. The City of Pittsburgh has decided, not without reason, that commercial parking operations should be singled out for special taxation to raise revenue because of traffic related problems engendered by these operations. This Court cannot say that placing such businesses in a separate taxable class is, ipso facto, an action so devoid of any reasonable basis as to constitute a violation of either the equal protection clause of the United States Constitution or the

uniformity clause of the Pennsylvania Constitution.[4] ". . . [W]here the state seeks to raise revenue, it need not justify any distinction drawn between the taxed and nontaxed with respect to the raising of revenue so long as some other reasonable basis for treating the various classes differently exists. Where such distinction exists, the wisdom of the legislative policy of taxing one class and not another is not a matter for the courts. 'Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and an earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.' *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U.S. 549, 569, 31 S. Ct. 259, 263 (1911)." *Commonwealth v. Life Assurance Co. of Pa.*, supra at 377-78 n. 11, 214 A. 2d at 215 n. 11.

IV.

Appellants' second avenue of attack is that the Parking Tax Ordinance, coupled with direct economic competition by the Public Parking Authority, created with

---

[4] In *Commonwealth v. Life Assurance Co. of Pa.*, 419 Pa. 370, 241 A. 2d 209 (1965), we held that the standards of the uniformity clause and of the equal protection clause are identical. The standard for uniformity under the Pennsylvania Constitution was further explicated in *P. J. Busse Co. v. Pittsburgh*, 443 Pa. 349, 279 A. 2d 14 (1971). There this Court said that the "test of uniformity is whether there is a reasonable distinction and difference between the classes of taxpayers sufficient to justify different tax treatment." Id. at 358, 279 A. 2d at 19. See *Amidon v. Kane*, 444 Pa. 38, 46-48, 279 A. 2d 53, 58-59 (1971).

public funds (see *Price v. Philadelphia Parking Authority*, 422 Pa. 317, 335, 221 A. 2d 138, 148 (1966)), violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Specifically appellants maintain that the ordinance imposes a rate so excessive and unreasonable in light of the direct governmental competition, that it amounts to a confiscation of property without just compensation. Because of the alleged excessive and unreasonable rates, in these circumstances, appellants assert that the vast majority of parking lot owners and operators can no longer afford to remain in business. Additionally they argue that even those owners who are still not operating at a loss are not earning a reasonable return. This complete inability to earn a reasonable return on investments is allegedly due to the combined effects of the 20 percent gross receipt tax and the competition from the Public Parking Authority, which charges lower rates. For example, the record establishes that the average all-day rate for the Public Parking Authority is about $2.00, while the average all-day rate for private operators is approximately $3.00.

In support of their contention appellants introduced at trial numerous statistical charts and compilations seeking to establish the unconstitutional impact of the gross receipts tax. A brief summary of this evidence shows the following.

After the imposition of the 20 percent gross receipts tax appellants' projected[5] figures for 1970 show that out

[5] Appellants' statistics for 1970 are based on actual revenues obtained for the first six months of 1970, and projections for the later six months based on revenues for those same months during 1969.

of 14 different parking lot operators in downtown Pittsburgh nine would sustain operating losses. Of the five operators earning a profit only two would achieve a return of one percent or better. The highest return projected for any of the 14 operators in 1970 was 2.9 percent.

Moreover, the evidence produced by appellants indicates that as the gross receipts tax increases from the original ten percent to the present 20 percent the percentage and number of parking lots unable to achieve any profit doubles. Again based on projections for 1970, when compelled to pay the 20 percent gross receipts tax, 65 percent of the individual lots would sustain operating losses. If the tax had remained at 15 percent, only 37 percent of the lots would fail to earn a profit. If the tax was reduced to its original ten percent then only 30 percent of the lots would sustain losses.

The chancellor, upon evaluating the evidence presented, held that appellants had failed to meet their heavy burden of establishing the tax was confiscatory.[6] Therefore, the chancellor concluded the Parking Tax Ordinance was not confiscatory or a taking without due process.[7]

---

[6] See *Amidon v. Kane*, 444 Pa. 38, 51, 279 A. 2d 53, 60 (1971); *F. J. Busse v. Pittsburgh*, 443 Pa. 349, 359, 279 A. 2d 14, 19 (1971); *Philadelphia v. Depuy*, 437 Pa. 276, 279, 244 A. 2d 741, 743 (1968).

[7] Among the factors weighed by the chancellor in reaching his determination that the tax rate was not confiscatory were the following.

1. Plaintiffs' statistics failed to include all parking lots in downtown Pittsburgh, serving to distort their financial projection.

2. Plaintiffs' projection failed to compute net profits.

He noted that even though "a few borderline operations may fall by the way" the tax is not necessarily confiscatory. The Commonwealth Court unanimously agreed that the tax was imposed at an unreasonable rate, but the majority concluded that although appellants as a group would sustain an operating loss under the unreasonably high tax, nevertheless "there is no constitutional prohibition of taxation at unreasonable or even confiscatory rates." *Alco Parking v. Pittsburgh*, 6 Pa. Commonwealth Ct. 433, 441, 291 A. 2d 556, 561, aff'd on rehearing, Pa. Commonwealth Ct. , 295 A. 2d 349 (1972). Moreover, the Commonwealth Court also unanimously agreed, contrary to the chancellor's findings, that "appellants' [sic] are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher rates but also *because the appellants are in competition with a public authority which, exempt from other taxes, can charge less.*" Id. (Emphasis added.)

---

3. The demand for parking spaces in Pittsburgh exceeds the supply.

4. None of the plaintiffs have increased their rates since February, 1970.

5. Plaintiffs have not attempted to pass on the increased tax to the parking lot patrons.

Moreover, the chancellor noted that plaintiffs failed to carry their heavy burden of proof that there was no reasonable basis for the tax. Specifically, the evidence revealed that gross receipts remained constant between 1969 and 1970 despite the tax increase; peripheral parking lots still operated at a profit; and plaintiffs' decreased rate of return was due at least in part to increased labor costs as well as increased tax liability.

Finally appellants contended that operating income less than ten percent of total revenues represented a confiscatory rate of taxation. The chancellor held that the court should not be asked to decide the question of what is a reasonable rate of return.

Undoubtedly, if a tax is shown to be confiscatory it is utterly impermissible and a violation of the Constitution. See *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 54 S. Ct. 599 (1933). This Court has been presented with similar allegedly excessive gross receipt taxes on parking lot operations on two prior occasions: *Philadelphia v. Eglin's Garages, Inc.*, 342 Pa. 142, 19 A. 2d 845 (1941); *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940). In both of those instances we held that the evidence presented by the parties attacking the taxing ordinance was insufficient to sustain a claim of confiscation without due process. However, neither case excluded the possibility that, upon a proper showing, a tax could be shown to be confiscatory. In *Samuels* and *Eglin* this Court indicated that two essential elements must exist before a tax can be held to be confiscatory. First the taxpayer must show that more than "an occasional operator cannot afford to continue in business." *Samuels*, supra at 327, 12 A. 2d at 82. Secondly, he must show that the tax cannot be passed on to the consumer. *Eglin*, supra at 144, 19 A. 2d at 845; *Samuels*, supra.

Appellants, on this record, have shown that more than "an occasional operator cannot afford to continue in business". However, the chancellor found that appellants have made no significant attempt to pass the tax on to the consumer. As noted previously the Commonwealth Court was of the unanimous opinion that the tax could not be passed on to the consumer because of the competition from the Public Parking Authority. Clearly if the private parking lot operators attempted to pass the full burden of the tax on to the consumers they would only succeed in increasing the disparity in the already dis-

parate rates. For example, at the all-day rates shown in the record, if appellants were to attempt to pass the tax on to their patrons, their rates would increase from an average of $3.00 to $3.60, while a similar tax pass-on by the Public Parking Authority would increase their average rate from $2.00 to $2.40. Thus the differential in rates would increase from $1.00 to $1.20.

Even if appellants have not fulfilled the dual tests of *Samuels* and *Eglin*, nevertheless neither *Samuels* nor *Eglin* are completely applicable here, because neither case dealt with the precise issue involved in this case. *Samuels* and *Eglin* were disputes involving only one issue—whether a gross receipts tax, *by itself*, imposed a rate so unreasonable as to be confiscatory. The instant case, on the other hand, presents a significantly different and exceedingly more complex question. Here the allegedly excessive and unreasonable tax is combined with direct competition at lower rates from the Pittsburgh Parking Authority.

It is rare for courts to strike down tax legislation because the tax rate imposed is excessive. Very few, if any courts have been willing to void a tax *solely on the basis of an unreasonably high rate*. Thus, in *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 47, 54 S. Ct. 599, 601 (1933), the Supreme Court emphasized that the question of whether a tax is so excessive that it will bring about the destruction of a business is *"a premise which, standing alone*, this court heretofore has uniformly rejected as furnishing no judicial grounds for striking down a taxing act." (Emphasis added.) See *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 562, 55 S. Ct. 525, 530 (1935); *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 48, 41 S. Ct. 219, 220 (1921). In this area courts

have usually deferred to legislative bodies. See *Stewart Dry Goods Co. v. Lewis*, supra; *Fox v. Standard Oil of New Jersey*, 294 U.S. 87, 99, 55 S. Ct. 333, 338 (1935).

However, these same courts have acknowledged that in exceptional circumstances the taxing power of the Legislature may be abused, and, if so, it would violate both the Fifth and Fourteenth Amendments. In *A. Magnano Co. v. Hamilton*, supra, although upholding the constitutionality of a tax on all butter substitutes, the Supreme Court stated: "Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. Brushaber v. Union Pac. R. R., 240 U.S. 1, 24, 36 S. Ct. 236, 60 L. Ed. 493. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. . . . That clause is applicable to a taxing statute such as the one here assailed *only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.* . . . Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses . . . unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state." Id. at 44, 54 S. Ct. at 601 (emphasis added) (citations

omitted.) See *Fox v. Standard Oil Co. of New Jersey*, supra at 100, 55 S. Ct. at 338; *Heiner v. Donnan*, 285 U.S. 312, 326, 52 S. Ct. 358, 361 (1932); *Nichols v. Coolidge*, 274 U.S. 531, 541, 47 S. Ct. 710, 713 (1926); *McCray v. United States*, 195 U.S. 27, 63, 24 S. Ct. 769, 779 (1904).[8]

Moreover, when determining the validity of a tax courts must evaluate the nature and effect of that tax, not merely its name or description. "The substance and not the shadow determines the validity of the exercise of the [taxing] power." *Stewart Dry Goods Co. v. Lewis*, supra at 555, 55 S. Ct. at 527. See *Senior v. Braden*, 295 U.S. 422, 429, 55 S. Ct. 800, 802 (1935).

This Court has heretofore not had occasion to hold a tax to be so excessive and unreasonable as to compel the conclusion that it was not the proper exertion of taxation, but a confiscation of property. However, this Court

---

[8] In *McCray v. United States*, 195 U.S. 27, 63, 24 S. Ct. 769, 779 (1904), the Supreme Court admonished that if a legislative power such as the taxing power were abused so as to destroy fundamental rights which no free government could consistently violate, it would be the duty of the judiciary to hold such acts to be void upon the assumption that the Constitution forbade them. "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred." Id. at 64, 24 S. Ct. at 780.

has not previously had presented to it a controversy where the taxing body was in direct competition, as here, with private enterprise and simultaneously imposed a burdensome gross receipts tax on all competitors in that activity (including itself).[9] This is undeniably a "rare and special instance"[10] where the due process clause imposes strict constraints upon the exercise of the legislative taxing power.

As appellants emphasize it is doubtful that the state Legislature ever intended the public parking authorities utilizing public financing advantages, to compete directly with private parking operators in this fashion. In fact, the declaration of policy in the Parking Authority Law of 1947[11] specifically provides: ". . . That it is intended that

---

[9] As of this writing, the Allegheny County Court of Common Pleas has ruled that the Public Parking Authority is exempt from payment of the challenged gross receipts tax. *Public Parking Authority of Pittsburgh v. City of Pittsburgh*, No. 687, July Term, 1972. See *Allegheny County v. Moon Township*, 436 Pa. 258 A. 2d 630 (1969). An appeal is presently pending before the Commonwealth Court.

However, whether the Public Parking Authority is subject to the tax seems to make little real difference in the context of this present dispute. Even if the Authority had to pay the tax to the City it would mean only in reality an accounting transaction, transferring dollars from one pocket of an instrumentality of City government to another. Thus although appellants' argument would be strengthened by the common pleas court's decision, we need not presently rest our decision upon *Public Parking Authority of Pittsburgh v. City of Pittsburgh*, supra.

[10] *A Magnano Co. v. Hamilton*, 292 U.S. 40, 44, 54 S. Ct. 599, 601 (1933).

[11] Parking Authority Law, Act of June 5, 1947, P. L. 459, §§1 et seq., as amended, 53 P.S. §§341 et seq.

the authority cooperate with all existing parking facilities so that private enterprise and government may mutually provide adequate parking services for the convenience of the public;" Act of June 5, 1947, P. L. 458, §2, as amended, 53 P.S. §342. Nonetheless, Pittsburgh parking operators are now not only denied the cooperation intended in the statute, but are actually confronted with direct, adverse competition from the Public Parking Authority.

Furthermore, the Public Parking Authority is blessed with certain other legislatively bestowed advantages and able, therefore, to charge lower rates. The Parking Authority is exempt from payment of all real estate taxes because of the exclusion given to public property used for public purposes.[12] Because lower interest rates are granted to municipal corporations seeking to borrow money, the Parking Authority is able to arrange cheaper and longer term financing. This also reduces significantly the rates charged by the Authority, and increases in intensity the degree and nature of its direct competition with the private parking lot operators. It is certainly undeniable that the Parking Authority is able to finance its site and construction costs through the attractive medium of long term, lower interest public financing, with all the benefits which attend such governmental arrangements, not available to private businessmen. See *Price v. Philadelphia Parking Authority*, 422 Pa. 317, 355, 221 A. 2d 138, 148 (1966). It is the combination of these factors which creates the extraordinary competitive advantage

[12] See generally *Allegheny County v. Moon Township*, 436 Pa. 54, 258 A. 2d 630 (1969).

which the Public Parking Authority is able to exert over the non-governmental parking lot owners and operators.

Not only is the Parking Authority able to charge lower rates than private operators, but with the enactment of the 20 percent gross receipts tax the taxing body now appropriates for itself practically all of the earnings of the private parking lot operators. By taking 20 percent of gross revenues "off the top" the City effectively confiscates what were formerly the earnings of the parking lot owners. This confiscation is practically as complete as if the City had condemned without compensation the private lots to erect public facilities.[13] In this situation it is unnecessary for private lot operators to prove that they cannot pass the tax on to their customers (although as previously noted the Commonwealth Court found this was not possible). See *Samuels,* supra; *Eglin,* supra. Clearly by raising their rates the private operators would greatly increase the already significant rate differential between private and public parking lots. The public competition thus effectively prohibits private lot operators from increasing their rates and passing the tax on to their patrons, while the imposed tax appropriates whatever earnings were formerly produced. Where such an unfair

---

[13] It is noted that while this appeal was pending before this Court the City of Pittsburgh enacted a Parking Tax Ordinance superseding the present, challenged Ordinance. The new Ordinance was scheduled to take effect April 1, 1973. This new Ordinance provides for the imposition "of a tax of 20 percentum (20%) upon the consideration *paid by the patrons of a non-residential parking place for each parking transaction, to be collected from the patron by the operator* of each such non-residential parking place; . . ." Ordinance No. 30, January 26, 1973 (emphasis added.)

competitive advantage accrues generated, by the use of public funds, to a local government at the expense of private property owners, without just compensation, a clear constitutional violation has occurred.[14]

---

[14] See Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964). Professor Sax has suggested a test for determining when just compensation is due private property owners as a result of governmental activity. In Professor Sax's view government interacts with the private sector in two ways. First, government "governs", i.e., "it mediates the disputes of various citizens and groups within the society" and "resolves the conflict among competing and conflicting alternatives." Id. at 62. Secondly, government acts in an enterprise capacity in which it acquires economic resources for its own account and thereby competes with private industry. Id.

Professor Sax states that: ". . . when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power." Id. at 63.

More specifically he adds: ". . . when an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.

"To be sure, the acquisition of title or the taking of physical possession will be present in the great majority of taking cases under this theory. But—and this is the important point—the presence or absence of a formal title-acquisition and/or invasion will never be conclusive. These formalities are not necessarily present when the government, as an enterpriser, is acquiring resources for its own account." Id. at 67.

This is admittedly a case of first impression in this Commonwealth. Traditionally governmental activities held to be unconstitutional takings of property without due process of law are restricted, for example, to the realm of zoning and eminent domain. However, no reason has been suggested why unconstitutional takings must necessarily be restricted only to this segment of the law. Indeed, this Court has held that "a 'taking' is not limited to an actual physical possession or seizure of the property;

Such an approach is indeed logical, and facilitates our analysis here. Clearly the City of Pittsburgh is acting in an enterprise capacity by operating a publicly financed parking lot which competes with private industry. To the extent that the Public Parking Authority has gained an unfair competitive edge over private parking lot owners through tax exemptions and lower rates, and more importantly appropriated an unreasonable proportion of their revenues via the gross receipts tax, a taking requiring just compensation has occurred. In the absence of any compensation a taking without due process of law results.

Applying a similar rationale to *Hasegawa v. Maui Pineapple Co.*, Haw. , 475 P. 2d 679 (1970), the Supreme Court of Hawaii invalidated a statute requiring private employers to pay their employees any wages they may have lost as a result of service on a jury or a public board or commission. The Court there stated: "In enacting HRS §388-32 the legislature attempted to shift to private employers some of the cost of running the public enterprises of juries and public boards and commissions. In this case money, instead of realty, is being taken for a public use. However, we see no difference between the taking of money to pay public employees and the taking of realty to house government institutions. *In both instances, the State is seeking to enhance the economic value of a government enterprise at the direct expense of a particular individual or group. This is precisely the kind of government 'taking' which requires just compensation.*" Id. at , 475 P. 2d at 684 (footnote omitted) (emphasis added).

if the *effect* of the zoning law or regulation is to deprive a property owner of the lawful use of his property it amounts to a 'taking', for which he must be justly compensated:" *Cleaver v. Board of Adjustment,* 414 Pa. 367, 372, 200 A. 2d 408, 412 (1964) and cases cited therein.

Moreover, in determining what is a taking this Court may not allow form to prevail over substance. As the Supreme Court noted, "The substance and not the shadow determines the validity of the exercise of the power." *Stewart Dry Goods Co. v. Lewis,* supra at 555, 55 S. Ct. at 527. Clearly "whether the government takes title or possession of the subject property is merely a matter of the form in which it chooses to proceed." Sax, Takings and the Police Power, 74 Yale L.J. 36, 46 (1964). Here the City has appropriated most, if not all, the earnings of the private parking lot owners through the imposition of an excessive gross receipts tax. It has also enhanced the detriment to private property owners by creating its own publicly subsidized competition. This governmental enterprise competing with private industry adds not only a new and most significant dimension to the traditional constitutional problem of what constitutes a taking without due process but also an impermissible one.

It must be concluded that the unreasonably burdensome 20 percent gross receipts tax, causing the majority of private parking lot operators to operate their businesses at a loss, in the special competitive circumstances of this case, constitutes an unconstitutional taking of private property without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

The order of the Commonwealth Court and the decree of the Allegheny County Court of Common Pleas are

reversed and remanded to the Allegheny County Court of Common Pleas for proceedings consistent with this opinion to determine the nature and extent of the refund to which appellants may be entitled.

Each party pay own costs.

Mr. Justice O'Brien concurs in the result.

Mr. Justice Eagen filed a dissenting opinion in which Mr. Chief Justice Jones joined.

Mr. Justice Pomeroy filed a dissenting opinion.

Dissenting Opinion by Mr. Justice Eagen:

I emphatically dissent!

It is not and may not be questioned that the City of Pittsburgh has the power to tax a parking transaction for revenue purposes under the Local Tax Enabling Act, Act of December 31, 1965, P. L. 1257, 53 P.S. §6902. See also, *University Club v. Pittsburgh,* 440 Pa. 562, 271 A. 2d 221 (1970). However, the majority rule that this particular tax on parking transactions imposed by the City of Pittsburgh is confiscatory, and, hence, amounts to an unconstitutional taking of private property without due process of law. Neither the *facts in the record* or the pertinent case law support this conclusion. In fact, every case cited by the majority in support of its conclusion reaches the opposite result.

Thirty-three years ago in *Philadelphia v. Samuels,* 338 Pa. 321, 12 A. 2d 79 (1940), this Court held that

before a tax may be ruled confiscatory the challenging taxpayer must establish two facts: (1) that the tax is forcing a substantial, as distinguished from an occasional, businessman out of business; and (2) the challeged tax cannot be passed on to the consumer. To the same effect, see *Philadelphia v. Eglin's Garage, Inc.*, 342 Pa. 142, 19 A. 2d 845 (1941). Even a casual reading of the instant record discloses the complaining-plaintiffs have failed to establish either one of these facts. Moreover, the trial court whose findings of fact have the force and effect of a jury's verdict and which, incidentally, the majority opinion ignores, specifically found on ample evidence in the record: (1) the demand for parking space in the City of Pittsburgh far exceeds the supply; (2) none of the plaintiffs have increased their rates because of the tax involved; (3) the plaintiffs have not attempted to pass on the increased tax to their parking patrons; and (4) when the City's Parking Authority recently raised its rates, it experienced only a temporary reduction in the number of cars seeking use of its parking facilities. Furthermore, after reviewing the evidence the trial court concluded that the complaining-plaintiffs are continuing to make a profit from their operations, though it may not be as great a margin as desired, and if any privately-owned parking operators are forced out of business it will be only a few border-line cases. It is obvious, therefore, that the majority opinion fails to comport with our rulings in *Philadelphia v. Samuels*, supra, and *Philadelphia v. Eglin's Garage, Inc.*, supra.

Focusing now on the decisions of the Supreme Court of the United States, it can be stated as a general prin-

ciple that under normal circumstances the power to tax is unlimited[1] and the due process clause of the Fifth and

[1] Early in the history of the Supreme Court of the United State, Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 17 S. Ct. 579 (1819), stated the following with respect to the unlimited nature of the taxing power:

"[T]he power of taxing people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may chose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

"The people of a state, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse." Id. at 428, 17 S. Ct. at 607.

In *Knowlton v. Moore*, 178 U.S. 41, 20 S. Ct. 747 (1900), the Supreme Court of the United States recognized the inherent difficulty in placing a limitation on the lawful exercise of the taxing power: "In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation could be levied." Id. at 60, 20 S. Ct. at

Fourteenth Amendments is not a limitation upon the taxing power of the legislative branch of the government.[2]

In *Magnano Co. v. Hamilton*, 292 U.S. 40, 54 S. Ct. 599 (1934), the Supreme Court explained under what circumstances the due process clause limits a taxing statute: "Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. . . . And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. . . . That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. . . . Collateral purposes or motives of a Legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope

---

[2] In *Brushaber v. Union Pac. R. R.*, 240 U.S. 1, 36 S. Ct. 236 (1916), the Supreme Court noted the due process clause is not a limitation on the lawful exercise of the taxing power stating: "So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. *Treat v. White*, 181 U.S. 264; *Patton v. Brady*, 184 U.S. 608; *McCray v. United States*, 195 U.S. 27, 61; *Flint v. Stone Tracy Co.*, supra; *Billings v. United States*, 232 U.S. 261, 282." Id. at 24, 36 S. Ct. at .

of judicial inquiry. . . . Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses . . . unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state." Id. at 44-45, 54 S. Ct. at 601-02. Thus, the due process clause only affects the validity of a taxing statute where it can be ascertained the statute is "arbitrary", and not an exercise of the taxing power, but a "disguise" for the exertion of a different and unlawful power. The majority opinion does not indicate this taxing statute qua taxing statute is invalid, or the taxing measure "does not involve an exertion of the taxing power," which are the guidelines established by the Supreme Court of the United States. Rather, the majority opinion focuses on the tax rate and its enforcement, and I view this as error. It is one thing to say a taxing statute is arbitrary and beyond the reach of the taxing power of the legislative branch, a point I do not contest, but it is quite another to say the exercise of the lawful taxing power is a violation of due process of law because of a high tax rate.

The Supreme Court of the United States has considered the issue of high tax rates in numerous instances, and in each case the Court refused to strike down the levy because of the high rate structure. In *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 55 S. Ct. 525 (1934), the Court reviewed a gross sales tax on merchants. Speak-

ing specifically of the extent of the burden of a tax, the Court stated:

"Every tax law must pass the constitutional test applied by the courts to the method of imposition, but the measure of the impost rests in the discretion of the Legislature.

"To condemn a levy on the sole ground that it is excessive would be to usurp a power vested not in the courts but in the Legislature and to exercise the usurped power arbitrarily by substituting our concept of public policy for those of the legislative body." Id. at 562, 55 S. Ct. at 530. Thus, in *Stewart*, the Court expressly stated the "measure of the impost" is not for the courts to consider. In *Veazie Bank v. Fenno*, 8 Wall. 533 (1869), again the Court reflected on the issue of high rates, stating: "It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

"The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution." Id. at 548. See also *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 41 S. Ct. 219 (1921). Not-

withstanding these pronouncements, the Majority opinion hinges its decision on consideration of the tax rate and enforcement or more precisely, the "result" of the exertion of the lawful taxing power, an approach the Supreme Court of the United States has consistently stated to be erroneous.[3]

If one focuses exclusively on the result by reviewing the tax rate and its impact, it is conceivable that every tax could be considered confiscatory. The true essence of the plaintiffs' claim is the tax rate is so high they are

---

[3] In *Magnano*, the Court stated: "The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the validity of the 10 percent tax imposed upon the notes of state banks involved in *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482. This court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments. 'The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.' Again, in the *McCray* case, supra, answering a like contention, this court said (page 50 of 195 U.S., 24 S. Ct. 769, 778) that the argument rested upon the proposition 'that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.' And it was held that if a tax be within the lawful power of the Legislature, the exertion of the power may not be restrained because of the results to arise from its exercise." 292 U.S. at 45, 54 S. Ct. at 602.

barred from making the profit margin they would desire. Given this fact, and accepting the majority's rationale, it follows that a marginal business with a small profit margin could make the same claim appellants herein assert about a 5% excise tax. In this regard, the *Magnano* Court stated: "If the tax imposed had been 5 cents instead of 15 cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act." 292 U.S. at 47, 54 S. Ct. at 602.

The most troublesome aspect of the rationale adopted by the majority opinion is that by considering the tax rate, it is taking on a non-judicial function, and in effect sitting as a legislative body. This approach strikes at the heart of the principle of separation of powers and is, therefore, contrary to constitutional doctrine. The sum and substance of the majority's opinion is: the tax rate is too high for the garage owners to make a substantial profit; hence, the tax is unjust and must be struck down. However, the wisdom of a tax rate is strictly for the legislative branch, and for this Court to strike a tax down because of a high rate is to usurp a legislative power. Moreover, by so doing this Court has to go beyond its own power and exercise the usurped power in an arbitrary fashion by substituting its concept of public policy, or wisdom, for

that of the Legislature. See *Stewart Dry Goods Co. v. Lewis*, supra.

In *McCray v. United States*, 195 U.S. 27, 24 S. Ct. 769 (1903), the Supreme Court stated:

"Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that in our constitutional system the judiciary was not only charged with the duty of upholding the Constitution but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation.

"It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the au-

thority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department." Id. at 53-54, 24 S. Ct. at . It is not within this Court's power or function to make legislative decisions, such as the wisdom of a particular tax rate. "Once the lawfulness of the method of levying the tax is affirmed, the judicial function ceases. He deludes himself by false hope who supposes that, if this court shall at some future time conclude the burden of exaction has become inordinately oppressive, it can interdict the tax." *Stewart Dry Goods Co. v. Lewis*, supra, 294 U.S. at 563, 55 S. Ct. 530.

The majority, however, would have us believe the rulings of the Supreme Court of the United States are not applicable to the instant case because of the element of competition. In my view, the argument that the combination of a high tax rate and government competition invalidates a taxing measure is spurious for the dual reason that the tax rate is not for us to consider, and the element of competition is basically irrelevant. Our concern is with the lawfulness of the method of levying the tax, not with these two elements. The majority apparently believes these two elements bring the tax within the

Magnano rule that a tax will be considered uniawful when "its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power." But there is not one shred of evidence in the record that this is anything but a pure taxing measure for revenue purposes. There is not any evidence in the record that this measure is a "disguise." Competition is clearly beyond the scope of this case, since our inquiry is limited to the lawfulness of the "form of taxation."[4]

The majority views government competition as a new element in this area of the law, an element never presented in a factual situation to a court before. However, in the *Veazie Bank Case*, the Supreme Court of the United States was faced with a comparable situation since the federal government was therein directly competing with the state banks in issuing currency.[5] A 10% tax was imposed on

---

[4] The question is raised by the majority's approach that if the government unit was in the public transportation field, would this dictate a like result. Under this example, the government would be "competing" with the parking lot owners, although the competition would be more indirect. Examples such as this show how far removed from the proper judicial function the majority will lead us. Moreover, the majority somehow suggests this tax puts the City at a competitive advantage; however, it is not this tax but the exemptions the City has from other taxes which puts the City in a better position than the private operators. Thus, it would appear under the majority approach not only this tax, and competition, but all taxes which affect the City, must be considered.

[5] It can be argued part of the foundation of this case rests on the power of the federal government to provide currency, however,

the notes of state banks and the effect was to put the national banks at a competitive advantage by driving the state banks out of existence. The Court never once discussed the element of competition and stated: "The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. *So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.*" 8 Wall., supra, at 548. Thus, I do not view the element of competition as adding anything new or different to this area of the law, or as relevant to the consideration of the lawfulness of a taxing form.

Mr. Chief Justice Jones joins in this opinion.

Dissenting Opinion by Mr. Justice Pomeroy:

I concur in the dissenting opinion of Mr. Justice Eagen, but believe it desirable to augment that opinion by several additional observations.

I.

I consider it unfortunate that the Court, in its footnote 2, prematurely and unnecessarily undertakes to decide the relative authority of our decisions in *Rochester & Pittsburgh Coal Co. v. Indiana County Board of Assessment*, 438 Pa. 506, 266 A. 2d 78 (1970), and *Lynch v. Owen J. Roberts School District*, 430 Pa. 461, 244 A. 2d

---

it is equally clear the case holds excessive tax rates alone will not invalidate a taxing measure.

1 (1968). These cases are concerned with equity jurisdiction in constitutionally-based challenges to taxing statutes where the challenge can be adjudicated in a statutorily prescribed appeal procedure. That question is only obliquely involved in this case in connection with the applicability of the procedure allowed by section 6 of the enabling statute[1] whereby the taxpayer can secure a judicial determination of the reasonableness of a local tax. There was no attempt by the taxpayers to avail themselves of the section 6 determination of "reasonableness"; neither was there any objection by the City at the trial level or on appeal in the Commonwealth Court to the exercise of equitable jurisdiction because the enabling act procedure had not been pursued. Thus the discussion in the Commonwealth Court opinion as to what a court might have done (i.e., find the tax rate "unreasonable") had a section 6 challenge been made was beside the point; the decision holds the tax valid on constitutional grounds. The same is true of this Court's opinion, since the decision goes off on constitutional grounds, albeit with the opposite result. All that the City is doing (part IV of its brief in this Court) is to argue that since the parties agree that the case raises issues solely of a constitutional nature, the "reasonableness" of the parking tax cannot be raised on this appeal. In any event, it argues, a section 6 attack

[1] The "Tax Anything Act", Dec. 31, 1965, P. L. 1257, as amended, 53 P.S. §6906. That section permits taxpayers aggrieved by a local tax measure to challenge its validity within a thirty (30) day period following enactment. The court shall then, if it concludes that the ordinance is unlawful or finds that the tax imposed is "excessive or unreasonable", declare the ordinance invalid, or may reduce the rate of the tax.

must be timely made, and in the trial court. In addition it cannot gain consideration in this suit by being "appended" to the constitutional issue—even a substantial one, which the City contends this one is not.

This Court has only recently granted allocatur in a case squarely presenting the jurisdictional problem involved in *Lynch* and *Rochester*, supra. *Borough of Greentree v. The Board of Property Assessment of Allegheny County*, Nos. 141 and 142, March Term, 1973 (Allocatur granted on April 11, 1973). Our ultimate decision in that case should not be prejudiced by needless dicta in this one.

II.

On the constitutional question, the Court today holds that the parking tax ordinance of the City of Pittsburgh is a taking of "private property . . . for public use without just compensation" in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, relying, *inter alia*, on dictum found in *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940). On this record I cannot agree.[2]

I can conceive that a tax could be confiscatory (and I do not understand Justice Eagen to be of a different view). For example, were the ordinance one imposing a tax of 100% on the *net income* of the appellants' enterprises, thus making it impossible beyond any doubt to operate at a profit, I am inclined to think that this would

[2] I do agree, however, that the tax is not imposed in violation of the uniformity requirement of the Constitution of Pennsylvania, Art. VIII, §1.

be a taking of private property for which compensation would be required. The tax here, of course, is on gross proceeds, not net income, and at the admittedly high rate of 20%. This tax *could*, however, be the practical equivalent of a 100% tax on net income if the operating expenses of the taxed enterprises absorb the other 80% of gross receipts. But this complete elimination of profitability would, of course, have to be supported by the experience of the industry.

It is at this point that the Court and I part company, for I believe that little attention has been paid to the facts of the case and the economic theories necessarily involved.[3] There are two factual issues: (a) current, substantial unprofitability of the taxed enterprises, and (b) lack of market power to shift the incidence of the tax to

---

[3] I also disagree with the majority's reliance (see opinion of the Court, ante at n.14) on the constitutional theories of Professor Sax, see Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964), and on the "similar rationale" of the Supreme Court of Hawaii in *Hasegawa v. Maui Pineapple Co.*, Haw. , 475 P. 2d 679 (1970).

In *DayBrite Lighting, Inc. v. Missouri*, 342 U.S. 421, 96 L. Ed. 469 (1952), the Supreme Court of the United States sustained against constitutional attack a Missouri statute which makes it a misdemeanor to deduct wages of an employee when the employee absents himself to vote. The Supreme Court has now unanimously reiterated that view in *Dean v. Gadsden Times Publishing Co.*, U.S. , L. Ed. 2d , 41 U.S.L.W. 3643 (June 11, 1973) (Per Curiam: an Alabama statute providing that an employee excused for jury duty "shall be entitled to his usual compensation received from such employment less the fee or compensation he received for serving as a juror" is on "no less sturdy a [constitutional] footing" than the statute upheld in *DayBrite Lighting*).

the parking consumer. Like the chancellor below[4]—to whose findings the Court pays scant heed[5]—I am not satisfied with appellants' evidentiary showings on either point.

(a) *Current, Substantial Unprofitability.*

Ordinance No. 704 of the City of Pittsburgh, imposing a 20% tax on the gross proceeds of commercial parking transaction, was enacted on December 31, 1969 and became effective on February 1, 1970. It superseded a predecessor parking tax (Ordinance No. 674) which was enacted in 1968 and which imposed a similar tax of 15%. We are told, though not part of the record made below, that Ordinance No. 704 in turn has been superseded by Ordinance No. 30 of January 26, 1973 which became effective on April 1, 1973. There is, therefore, a period

---

[4] The chancellor found that:

"19. The demand for parking spaces in the City of Pittsburgh far exceeds the supply.

20. None of the plaintiffs have [sic] increased their [sic] rates since February of 1970.

21. Plaintiffs have not attempted to pass on the increased tax on the parking lot patrons."

[5] As the majority opinion indicates, the Commonwealth Court reversed the chancellor's finding, and observed that: "The appellants are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher rates but also because the appellants are in competition with a public authority which, exempt from other taxes, can charge less." While I see no basis for reversing the chancellor's findings of fact, it is to be noted that the Commonwealth Court *affirmed* the chancellor's conclusions of law. Thus that court could as easily have said that "even on appellants' version of the facts, affirmance would be in order."

of a little more than three years during which appellants' businesses were subject to and in fact paid the disputed tax. The present lawsuit, however, was filed on February 20, 1970, very soon (nineteen days) after the tax became effective, and the trial of the case took place on September 15, 16, and 17, 1970. The economic evidence there introduced was as the Court's opinion indicates, "*projected* figures for 1970" based on industry experience under the challenged tax from February 1, 1970 through May 31, 1970. While there is nothing inherently inadmissible about economic projections, properly constructed and qualified,[6] I think that they become inherently inadequate when actual economic data are in fact available for the period of the projection. We do not adequately discharge our duty of invalidating taxing acts, see *Commonwealth v. Life Assurance Co. of Pennsylvania*, 419 Pa. 370, 377, 214 A. 2d 209 (1965), as "clearly, palpably and plainly" unconstitutional when we so hold on the basis of five months' experience under the statute as contrasted with the now available three years' experience. The appellants have prevailed in no court save this one and hence have throughout that period been subject to the 20% tax. I cannot see that a remand for develop-

[6] The plaintiff-appellants' witness who assembled the economic data supplied to him by appellants was by education an electrical engineer. He had at one time taken one 6 months course in statistics but none in accounting. The data introduced did not purport to be a complete presentation of the operations of appellants' business entities. In addition, there was no showing of what fraction of the operating expenses represented salary attributed to the owners of the various enterprises involved here, or what portion of such payments to owners could fairly be said to represent return on investment.

ment of the record in light of *actual industry experience* would prejudice the interests of any party to these proceedings, public or private. Certainly the people of the City of Pittsburgh are entitled to as much before losing the millions of dollars in tax revenues here involved.

(b) *Lack of Market Power to Shift the Incidence of the Tax.*

Appellants' showing of a lack of ability to pass the tax on to the consumer is most unpersuasive. It consisted of two kinds of evidence: first, assertions on behalf of the appellant-enterprises that they were charging all the traffic would bear at the time of enactment of the 20% tax, i.e., prices which maximized their gross proceeds,[7] and second, testimony of the manager of Meyers Bros. Parking-Central Corporation, the operator of the parking garage in Chatham Center, that when that corporation raised its prices in 1968 in response to the enact-

---

[7] A representative sample of such testimony follows: "Q: . . . Is it feasible for you to raise your rates now to meet this tax? A: I cannot raise the rates now. If I could raise the rates to meet this tax that's been in effect since February, I would have. I do not feel that I would accomplish anything but drive my customers away if I raise my rates at this time.

. . .

A: . . . I have a feeling for this business . . . There is only so much you can charge.

. . .

Q: So . . . [W]hat is your opinion as to whether this parking tax can be passed on? A: The parking tax can never be passed on. That is silly. You are charging the rate that you think is the best one for you right at that time. If you raise that rate, you either drive customers away or you change the character of the business." Record at 19, 20.

ment of the 1968 ordinances of 15%, the business of that garage had actually diminished.

As to the first, I do not think it follows from the fact that all private entrepreneurs strive to maximize profits that all prices set by them are at profit-maximizing levels. The bare assertion by an appellant that "[if] I could raise the rates to meet this tax . . ., I would have . . ." falls far short of the quality of proof required to show the tax clearly, palpably and plainly unconstitutional.

The second line of proof is similarly inadequate. At issue here is the market power of the *taxed industry* to shift the incidence of the tax to the consumer. What occurred in 1968 when *one member* of that industry raised its rates is hardly probative of what would occur if the *industry*, in response to enactment of a tax ordinance at a higher rate, were to raise rates.[8]

Not only do I conclude that appellants failed in their proof of inability to shift the tax burden such as to invalidate the tax, but I find ample evidence of the existence of such market power. First, there is the fact, revealed by the testimony of appellants' witnesses, that appellants have posted general rate increases at intervals in the 1960s and have always experienced an increase in gross receipts. Second is the fact—a matter of common knowledge in Pittsburgh of which I think the Court can take

---

[8] I would consider the experience of Meyers Bros. as only of marginal relevance to the situation in the City at large. The Chatham Center Garage rates both in 1970 and in 1973 have been less than those in comparable downtown garages, which no doubt indicates a less strategic competitive position.

judicial notice—that the current parking rates generally posted in downtown Pittsburgh reflect a significant rate increase over those rates of the summer of 1970 which appellants sought to characterize as profit-maximized.[9] It would appear, then, that the demand for parking spaces which appellants thought in 1970 would decline in the face of a price increase, thus resulting in a decrease of gross receipts, in fact now supports the increased rates of 1973. Whether or not gross receipts have fallen I, of course, do not know; I suggest that the increased prices have now been in effect long enough for appellants to have determined whether their operations are losing business or benefitting because of them. And finally, there is the fact that there exists at this time no source of supply which could satisfy any portion of the demand now satisfied by appellants' garages and lots. This brings me to the position of the Pittsburgh Parking Authority.

III.

Whether or not appellants possess the market power to shift the incidence of this tax depends to a large degree on the presence of competitors, i.e., other sources of supply capable of satisfying demand formerly satisfied by appellants. Were it the case that the Parking Authority and appellants were *individually* capable of satisfying *all* demand in the market, *any* price differential between the rates of the Authority and those of appellants would logically cause all demand to seek the source of cheapest supply. Under such a market condition, appellants would necessarily charge rates the same as or lower than those

[9] See the Appendix to this opinion.

of the Parking Authority and would be unable to pass a parking tax on to the consumer if doing so caused them to charge rates above those of the Authority. If the tax thus imposed also removed all profitability from the private business of commercial parking, then I think the evidentiary requirements of *Philadelphia v. Samuels*, supra, would be met.

It is clear, however, that such is not the situation here. The record shows that there are some 24,000 parking spaces in downtown Pittsburgh; of these, 17,470 are controlled by appellants here and 6,530 are controlled by the Pittsburgh Parking Authority; there exists also a demand, as yet unsatisfied, for approximately 4,000 additional spaces, a demand which is projected to increase by 1979 to 10,500 spaces. The price differential between the lower rates of the Parking Authority and the higher rates of appellants which so concerns the majority is proof positive, so it seems to me, that appellants supply a demand that cannot be satisfied by the Authority. This is to say, an enterpreneur (the appellants) who controls 71% of the supply in a market of unsatisfied demand need not concern himself with a low-cost competitor (the Parking Authority) who controls 29% of the supply, has no excess capacity, and cannot service demand which the 71% competitor might drive away through price increases. The competitors with which appellants must concern themselves are the *alternatives to driving* (i.e., public transportation, car pools, etc.). But there is much public debate today whether the American driver can be forced out of his privately owned and privately driven automobile, whatever the cost of operation may be.

The presence of the Parking Authority in this picture, and its preferred status in terms of property taxes, is therefore in my view an irrelevant factor.

For the reasons given, I would remand for further proceedings to determine appellants' *actual* experience under the 20% gross receipts ordinance and would reserve judgment meanwhile on the question of whether an unconstitutional taking by excessive, confiscatory taxation has occurred.[10] I therefore dissent.

---

[10] I would consider it unfortunate if today's opinion might be thought to have restrictive implications for the future discouragement by a metropolitan government of the operation of private vehicles in the congested, downtown areas. Governmental activity in the field of environmental and motor vehicle control is increasing apace. This trend may ultimately remove the profitability from some commercial activities, such as providing parking space, which today depend on the automobile. I should hope that government is not constitutionally obligated to purchase those activities. Under current Fifth Amendment law, I am satisfied that is not the case. *Goldblatt v. Hempstead*, 369 U.S. 590, 8 L. Ed. 2d 130 (1962).

APPENDIX TO THE DISSENTING OPINION OF MR. JUSTICE POMEROY

Arranged below is a tabular comparison of the rates charged by lots and garages operated by the plaintiff-appellant Alco Parking Corporation. The 1970 rates are taken from the record filed in this Court; the 1973 figures are those which were publicly displayed on the afternoon of May 17, 1973.

Sixth & Penn Garage (Corner of Sixth Street & Penn Avenue)

Day Rates	1970	1973
1 hr.	$0.75	$0.85
2 hrs.	1.00	1.10
3 hrs.	1.25	1.35
4 hrs.	1.50	1.60
5 hrs.	1.75	1.85
6 hrs.	2.00	2.10
7-8 hrs.	2.25	2.35
8-9 hrs.	2.50	
8-24 hrs.	2.50	2.60

Greyhound Garage (Penn Avenue at 12th Street)

Day Rates	1970	1973
1 hr.	$0.60	$0.75
2 hrs.	0.70	1.00
3 hrs.	0.90	1.25
4 hrs.	1.00	1.50
5 hrs.	1.30	1.75
5-8 hrs.	1.50	2.00
8-10 hrs.	1.75	2.25
11 hrs.	1.90	2.50
12 hrs.	2.15	2.75
12-24 hrs.	2.40	2.75

IBM Garage* (Blvd. of the Allies and Stanwix Street)

Day Rates	1970	1973
1 hr.	$0.75	$1.00
2 hrs.	1.00	1.25
3 hrs.	1.25	1.50
4 hrs.	1.50	1.80
5 hrs.	1.75	2.10
6 hrs.	2.00	2.40
7 hrs.	2.25	2.70
7-12 hrs.	2.50	3.00
12-16 hrs.	2.75	3.25
16-24 hrs.	3.00	3.50

*operated in 1973 by Wm. Penn Parking, another plaintiff-appellant.

Gateway Towers Garage (Ft. Duquesne Blvd. & Commonwealth Place)

Day Rates	1970	1973
1 hr.	$0.50	$1.00
2 hrs.	0.75	1.25
3 hrs.	1.00	1.50
4 hrs.		1.75
+ ea. add. hr.	0.25	0.25
max. for 24	3.00	3.25
weekly	15.00	18.00

White Tower Lot (Liberty Avenue between 10th and 11th Streets)

Day Rates	1970	1973
1 hr.	$0.60	$0.75
2 hrs.	0.85	1.00
3 hrs.	1.15	1.25
4 hrs.	1.40	1.50
5 hrs.	1.65	1.75
6 hrs.	1.90	2.00
7 hrs.	2.15	2.25
Max.	2.15	2.50

U.S.O. Lot (Penn Central R.R. Station)

Day Rates	1970	1973
1 hr.	$0.70	$0.75
2 hrs.	0.85	1.00
3 hrs.	1.15	1.25
4 hrs.	1.40	1.50
5 hrs.	1.65	1.75
6 hrs.	1.90	2.00
7-12 hrs.	2.50	6-12 hrs 2.25
		12-24 hrs 2.50

Maiden Lane Lot (10th Street to 11th Street, North of Penn Avenue)

Day Rate	1970	1973
All-day parking	$1.50	$1.75

THE SUPREME COURT OF PENNSYLVANIA
Western District

ORDER

August 7, 1973.

Petition Denied.

Per Curiam

Mr. Justice Eagen dissents.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 643 C.D. 1971

Alco Parking Corporation; Arena Parking, Inc.; Campus Parking, Inc.; Fourth Avenue Parking, Inc.; Grant Parking Inc.; Harry W. Sheppard, Jr., t/a Stanwix Auto Park; John Cominos, t/a Liberty Parking; John Stabile and Rocco A. Del Sardo, t/a Wm. Penn Parking Lot; K-Seven Parking Company; Meyers Bros. Parking-Central Corp.; Parking Service Corporation, Inc.; Wm. Penn Parking Garage, Inc.,

Appellants

v.

City of Pittsburgh,

Appellee

Before

Honorable James S. Bowman, President Judge.
Honorable James C. Crumlish, Jr., Judge.
Honorable Harry A. Kramer, Judge.
Honorable Roy Wilkinson, Jr., Judge.
Honorable Glenn E. Mencer, Judge.
Honorable Theodore O. Rogers, Judge.
Honorable Genevieve Blatt, Judge.

Argued Monday, September 11, 1972.

OPINION

[6 Pa. Commonwealth Ct. 453]

Opinion by Judge Rogers, filed October 10, 1972:

This court affirmed the order of the lower court in this matter[1] but thereafter allowed reargument. The case has been reargued and additional briefs have been filed and carefully considered.

A principal factual issue below was as to the effect of the tax on appellants' parking lot operations. The expression of the opinion writer's belief that the 20 percent gross receipts tax was unreasonable is now equated by the appellants to a finding by this court that the tax was confiscatory. No such characterization of the taxing measure was made or intended to be made. Indeed the Court found that the ordinance was an exertion of the taxing power and did not constitute the exertion of a different and forbidden power, as, for example, the confiscation of property. Further, neither the Constitution of the United States nor of this Commonwealth imposes a standard of reasonablenesses in the *rate* of taxation. The cases cited in our opinion recognize this principle and the unspoken but real danger to our system of government should the courts assume power to review revenue measures by such a standard. It is true that a public parking Authority operates in competition with appellants' lots. However, the tax before us is imposed on transactions of the Authority as well as those of the appellants and we do not perceive a purpose here to favor the Authority by

---

[1] See Pa. Commonwealth Ct. , , 291 A. 2d 556, 563 (1972).

destroying the appellants' businesses. Of course, the Legislature may afford court review of reasonableness and, as we noted, did so in Act 511 by procedures not invoked by the appellants.

The City advises us at reargument that our statement that there are 24,300 parking spaces in the City of Pittsburgh is erroneous and that that figure represents the number of parking spaces only in the "downtown" area. The lower court found that the number in question represented all spaces in the City. The appellants made the same assertion in their brief and this was uncontested by the City. A close examination of the record demonstrates that the court below, the appellants and we were incorrect and that the figure mentioned indeed represents the number of parking spaces in the "downtown" area only. While a higher number of spaces in the City, by reducing the percentage of appellants' lots to the total tends to bolster the City's assertion that the levy was in fact not unreasonable, it obviously had no effect on our *decision* upholding the ordinance.

We adhere to our decision affirming the order of the court below.

Theodore O. Rogers,
J.

Dissenting Opinion by Judge Kramer, October 10, 1972:

After reargument and reviewing the majority opinions, I must again register my dissent by reasserting the points made in my prior dissenting opinion, filed herein, which is made a part hereof by reference thereto. *See*

Pa. Commonwealth Ct. , 291 A. 2d 556, 563 (1972).

Based upon the record before us, I would still hold the unreasonable high twenty per cent (20%) parking tax to be confiscatory. I would still remand the case to the court below for further hearings on reasonableness.

The majority, in its second opinion, quite correctly points out the discrepancy in the number of parking spaces in the City of Pittsburgh; and, as was noted at the reargument, the number of Authority parking spaces in the neighborhood areas outside of the downtown business district, together with the number of parking spaces contained in parking lots directly owned and controlled by the City, and operated with City employees, should also be noted as discrepancies or missing statistics in the record.

I would reverse and remand.

Harry A. Kramer,
J.

Judges Crumlish, Jr. and Mencer join in this Dissenting Opinion.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 643 C.D. 1971

Alco Parking Corporation; Arena Parking, Inc.; Campus Parking, Inc.; Fourth Avenue Parking, Inc.; Grant Parking Inc.; Harry W. Sheppard, Jr., t/a Stanwix Auto Park; John Cominos, t/a Liberty Parking; John Stabile and Rocco A. Del Sardo, t/a Wm. Penn Parking Lot; K-Seven Parking Company; Meyers Bros. Parking-Central Corp.; Parking Service Corporation, Inc.; Wm. Penn Parking Garage, Inc.,

Appellants

v.

City of Pittsburgh,

Appellee

Before

Honorable James S. Bowman, President Judge.
Honorable James C. Crumlish, Jr., Judge.
Honorable Harry A. Kramer, Judge.
Honorable Roy Wilkinson, Jr., Judge.
Honorable Glenn E. Mencer, Judge.
Honorable Theodore O. Rogers, Judge.
Honorable Geneviene Blatt, Judge.
Argued February 22, 1972—Pittsburgh.

OPINION

[6 Pa. Commonwealth Ct. 435]

Opinion by Judge Rogers, filed June 8, 1972:

The City of Pittsburgh in December 1969, pursuant to The Local Tax Enabling Act of December 31, 1965, P. L. 1257, 53 P.S. §6901, *et seq.*, enacted an ordinance imposing upon all parking transactions of operators of nonresidential parking places a tax at the rate of twenty per centum of the gross receipts from such transactions received during the year commencing February 1, 1970 and thereafter. The city has imposed a tax identical except as to rate since the year 1962, the ordinance imposing such prior to the year 1965 having been imposed under the Act of June 25, 1947, P. L. 1145, 53 P.S. §6851, repealed and replaced by the Act of December 31, 1965, P. L. 1257. Under said ordinances the tax has been increased from ten per centum in 1962 to fifteen per centum in 1968 and by the ordinance here under attack to twenty per centum.

The appellants, parking lot operators, here sought in equity to restrain the city from enforcing the twenty per centum ordinance effective February 1, 1970. The court below, after trial on the merits, made an adjudication *nisi* dismissing the complaint and, after exceptions filed and dismissed, a decree that its adjudication *nisi* should be entered as a final decree. This appeal followed.

The subject of municipal taxes upon the gross receipts of parking lot transactions has been the subject of considerable litigation. All save one of the appellants' contentions here have been conclusively decided against

them, and we will not burden this opinion by a lengthy repetition of the reasoning of such definitive holdings.

The appellants suggest that under the equal protection clause of the Fourteenth Amendment of the United States Constitution and uniformity clause of Article VIII section one[1] of the Constitution of Pennsylvania, their business may not be singled out for this tax. Their fire comes from two barrels: first, that there is no rational basis for distinguishing the commercial parking business from other busnesses and second, that there is no such basis for distinction between nonresidential and residential parking. Unfortunately for the appellants the targets at which they aim have been long since removed from the range. In *Philadelphia v. Samuels,* 338 Pa. 321, 12 A. 2d 79 (1940), the Supreme Court upheld for the purpose of a tax identical to that in the instant case by implication a classification of parking lots as distinguished from other businesses and explicitly the classification of open parking lots as distinguished from closed parking lots, writing:

> "Another contention is that the ordinance is bad as discriminating against open parking lots in favor of closed garages engaged in parking. It has not been shown that the municipal legislature did not have reasonable ground for separating open parking lots from closed garages and placing them in separate classes for the purpose of taxing the parking transaction in the open lot. The growth of such parking in recent years is [a] matter of common knowledge

[1] The appellants, *Alco Parking Corp., et al.,* refer, we assume by inadvertence, to Art. IX, section 1. the place where the so-called uniformity clause was, prior to 1968, located.

of which the courts take notice. Generally, the operation of such lots involves more extensive use of sidewalk and street than is involved in the operation of the closed garage; land occupied by a closed garage is assessed at the value of land and buildings, whereas the open parking lot is assessed without buildings or buildings of negligible value. Other elements of the same general character suggest themselves. In such circumstances the court cannot say that the municipal authorities had not sufficient reason for the classification." 338 Pa. at 326, 327, 12 A. 2d at 82.

In *McGillick v. City of Pittsburgh*, 415 Pa. 581, 203 A. 2d 480 (1964), the Supreme Court affirmed *per curiam* an order of the Allegheny County Court specifically upholding the city's classification, continued in the present ordinance, of commercial parking places as taxable and residential as not subject to levy. Finally, on this point, lacking better expression of our own devising, we quote from *Commonwealth v. Lafferty*, 426 Pa. 541, 550, 233 A. 2d 256, 261 (1967), where the classification upheld was that of taxable non-public utilities as distinguished from excluded public utilities. Mr. Justice Eagen there wrote:

"Further, it is in the context of the whole Sales and Use Tax statute that we must view the exclusion. Since this statute is one designed to raise revenue, the state need not justify any distinction drawn between the taxed and the non-taxed 'so long as some other reasonable basis for treating the various classes differently exists. Where such distinction exists, the

wisdom of the legislative policy of taxing one class and not another is not a matter for the courts.' *Commonwealth v. Life Assurance Co. of Pa.* 419 Pa. 370, 377 n. 11, 214 A. 2d 209, 215 n. 11 (1965). As stated in *Commonwealth v. Life Assurance Co. of Pa.*, Id. at 376-377, 214 A. 2d at 214: 'By necessity a wide discretion must be conceded to the Legislature in the classification of various businesses or occupations for purposes of taxation. . . .'"

As further stated in *Commonwealth v. Life Assurance Co. of Pa.*, 419 Pa. 370, 376, 379, 214 A. 2d 209, 214, 215 (1965):

"The only constitutional limitation placed upon the power of the Legislature to distinguish between various entities for purposes of taxation is that their basis for doing so be reasonable. . . .

* * * * * * *

"And where such distinction rests upon differences recognized and acted upon by the business world, it is not within the province of the courts to intrude. . . So long as the classification is neither capricious nor arbitrary, there is no denial of the equal protection of the law. . . ."

The distinction here between parking lots and other businesses and between commercial and residential parking lots, as has been held in *Philadelphia v. Samuels*, supra and *McGillick v. City of Pittsburgh, supra*, satisfy constitutional requirements.

Within the general ambit of equal protection and uniformity, the appellants make two other arguments, one

based on what this tax might be named and the other on the asserted inaccuracy of a statement in the preamble of the ordinance concerning the characteristics of the appellants' enterprises. As to the first, appellant Meyers Brothers contends that because the city at sometime in the course of the litigation called the tax a license tax, it is such and under settled principles may not exceed the cost of regulation. As clearly declared in *Philadelphia v. Samuels, supra,* the measure in question is an excise tax imposed upon the transaction of parking a motor vehicle. It is a revenue measure by terms of the ordinance and by the Act of Assembly by which it was authorized. In *Philadelphia Tax Review Board v. Smith, Kline and French Laboratories,* 437 Pa. 197, 262 A. 2d 135 (1970), the Supreme Court held that a tax imposed by the City specifically denominated a "License Tax" was nevertheless a revenue measure and not preempted by a state license and regulatory measure.[2]

The appellants' argument that the preamble of the ordinance here somehow supports their view that the classification of their enterprises for the tax is unreason-

---

[2] The appellants also contend that they are subjected to double taxation because the city levies a six-mill tax on gross receipts upon all businesses in the city, also pursuant to The Local Tax Enabling Act. There is no constitutional prohibition of double taxation, (*Puntureri v. Pittsburgh School District,* 359 Pa. 596, 60 A. 2d 42 (1948)), provided uniformity is satisfied. *Plumly v. Philadelphia School District,* 182 Pa. Superior Ct. 122, 126 A. 2d 768 (1956). Not only is the general business tax imposed on the *privilege* of engaging in business in the city and the tax here is on the *parking transaction,* a different subject; but uniformity is, as we have herein held, supplied by the imposition of the same taxes upon all commercial parking establishments.

able is difficult to follow because it stems from a misreading of the ordinance. The preamble in question states: "Nonresidential parking places, by reason of the frequency of their use at various hours of the day, their location, their relationship to traffic congestion and other characteristics, present problems requiring municipal services and affect public interest, differently from parking places accessory to the use and occupancy of residences. . . ." The appellants say that this seeks to justify the classification of parking lots on the basis that such lots cause congestion and therefore require municipal services, and that because such lots in fact alleviate congestion and reduce municipal concern for traffic congestion, the asserted basis for classification disappears. But the quoted portion of the ordinance, as we read it, does not seek to justify the distinction between parking lots and other business but between nonresidential and residential lots. Nor does it suggest that parking lots cause congestion; rather, it says that their activities are related to congestion and require municipal services.

We have attempted here to treat all of appellants' arguments based upon alleged want of equal protection and lack of uniformity. We have carefully considered their thorough briefs and have concluded that the ordinance satisfies these constitutional requirements.

The appellants further vigorously contend that rate of tax here imposed is so high as to result in the taking of their property without due process of law. A tax, they say, which is confiscatory is unconstitutional. Despite the city's argument and the finding of the court below to the contrary, this tax is indeed imposed at an unreason-

able rate. The *undisputed evidence* on this record is as follows:

1. There are about 24,300 parking spaces in the City of Pittsburgh. Of this number 6100 are served by a public parking authority, subjected to this tax, but exempt from other taxes including those on real estate. Of the balance of about 18,000 spaces, the plaintiffs here owned or operated about 17,000.

2. Based upon six months' operations and a sound statistical projection for the balance of the year 1970 with expenses computed at 1969 rates, that portion of the industry represented by appellants, would, during the year 1970, earn gross revenues of over $8,000,000, pay $1,600,000 on account of this tax and sustain a loss of $270,000. Of the fourteen appellant enterprises nine would sustain losses and of the others the one showing the largest profit would earn an amount equal to only 2.9% of its gross revenues.[3]

3. The appellants are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher rates but also because the appellants are in competition with a public authority which, exempt from other taxes, can charge less.

4. The rate of tax was increased from fifteen per centum effective in 1969 to twenty per centum, although in 1969 the appellants lost $26,000 on gross revenues

[3] Omitted from these figures are four operations. The record is clear that one of those omitted would have shown a sizable loss due to unusual factors. The other three were management operations for which the appellants received a fixed fee and the owners took losses.

of about $7,700,000 on which they paid a tax under this ordinance of more than $1,400,000.

The problem, however, is that there is no constitutional prohibition of taxation at unreasonable or even confiscatory rates. The appellants' argument upon this point rests primarily upon the following statement by Mr. Justice Linn in *Philadelphia v. Samuels,* 338 Pa. at 327, 12 A. 2d at 82:

> "Little need be said on the point that the ordinance is confiscatory. The state expressly authorized the city to levy taxes for general revenue purposes and the ordinance so provides. There is nothing in the record to show that the rate imposed by the ordinance is so high as to result in taking property without due process. The probability is that, in effect, the tax will be passed on to patrons, but if it is not, and if an occasional operator cannot afford to continue in business and pay the tax, it may be unfortunate but will not render the ordinance invalid."

At most this statement supplies no more than an implication that an ordinance which makes it impossible for more than an occasional operator to remain in business might be invalid. On the other hand, language used by the Supreme Court in *Philadelphia v. Eglin's Garages, Inc.,* 342 Pa. 142, 144, 19 A. 2d 845 (1941), one year later indicates second thoughts concerning the quoted portions of the *Samuels* case:

> "Proof of the averments of loss . . . would not establish confiscation even if relevant. . . . In my view, therefore, the averments of loss referred to are

not sufficient to sustain the charge of confiscation *assumed to be relevant.*" (Emphasis supplied.)

It is apparent to us that our Supreme Court had in the interval considered the question in the light of very clear principle that a tax for revenue purposes is subject to no constitutional limitation upon its amount. Hence, writers and the courts have declared:

> "The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. . . ."
>
> Cooley, *Constitutional Limitations,* Eighth Ed. (1927), Vol. II, C. XIV, page 986.

> "[T]he power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.
>
> "The people of a state, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the con-

stituents over their representative, to guard them against its abuse."

Chief Justice John Marshall in *McCulloch v. Maryland,* 4 Wheat. 316, 428, 17 S. Ct. 579 607 (1819).

"Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. *Brushaber v. Union Pac. R.R.,* 240 U.S. 1, 24, 36 S. Ct. 236, 60 L. Ed. 493. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. *French v. Barber Asphalt Paving Co.,* 181 U.S. 324, 329, 21 S. Ct. 625, 45 L. Ed. 879; *Heiner v. Donnan,* 285 U.S. 312, 326, 52 S. Ct. 358, 76 L. Ed. 772. That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. Compare *McCulloch v. Maryland,* 4 Wheat. 316, 423, 4 L. Ed. 579; *Child Labor Tax Case,* 259 U.S. 20, 37 et seq., 42 S. Ct. 449, 66 L. Ed. 817, 21 A.L.R. 1432; *McCray v. United States,* 195 U.S. 27, 60, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; *Brushaber v. Union Pac. R.R.,* supra, 240 U.S. 24, 25, 36 S. Ct. 236, 60 L. Ed. 493, L.R.A. 1917D, 414, Ann. Cas. 1917B, 713; *Henderson Bridge Co. v. Henderson,* 173 U.S. 592, 614, 615, 19 S. Ct. 553, 43 L. Ed. 823; *Nichols v. Coolidge,* 274 U.S. 531, 542, 47

S. Ct. 710, 71 L. Ed. 1184, 52 A.L.R. 1081. Collateral purposes or motives of a Legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. *McCray v. United States,* supra, 195 U.S. 56-59, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561. Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses (*Citizens' Sav. & Loan Association v. Topeka,* 20 Wall. 655, 663, 664, 22 L. Ed. 455; *McCray v. United States,* supra, 195 U.S. 56-58, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561, and authorities cited; *Alaska Fish Co. v. Smith,* 255 U.S. 44, 48, 49, 41 S. Ct. 219, 65 L. Ed. 489; *Child Labor Tax Case,* supra, 259 U.S. 38, 40-43, 42 S. Ct. 449, 66 L. Ed. 817, 21 A.L.R. 1432), unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state. The present case does not furnish such a demonstration."

Justice Sutherland in *A. Magnano Co. v. Hamilton,* 292 U.S. 40, 44, 45, 54 S. Ct. 599, 601 602 (1934).

Instructive early Pennsylvania cases to the same effect are *Kirby v. Shaw,* 19 Pa. 258 (1852); *Sharpless v. Mayor of Philadelphia,* 21 Pa. 147 (1853); *Washington Avenue,* 69 Pa. 352 (1871).

We have examined the cases cited by the appellants as authority for the power of a court to strike down taxing ordinances found to be excessive[4] and find them inappropriate to this case. In each the exorbitant exaction was in the form of a true municipal charge for conducting an otherwise lawful business and in each there were overtones of either subservience to a private purpose or lack of uniformity or attempt to regulate. No such conditions exist with regard to this general revenue measure. In any event, there are no similar Pennsylvania cases.

Having concluded that there is no constitutional infirmity suffered by the ordinance before us based upon the rate of taxation, it remains for us to consider whether The Local Tax Enabling Act contains a limitation upon the city's power to impose a tax in the unreasonable amount here levied. Section 5 of the Act, 53 P.S. §6905 provides that: "Any tax imposed under this act shall not be subject to any limitations under existing laws as to rate or amount or as to the necessity of securing court approval or as to budgetary requirements." However, Section 6, 53 P.S. §6906, authorizes taxpayers to appeal from the taxing ordinance or resolution within thirty days of its enactment and imposes upon the court the duty ". . . *to declare the ordinance* and the tax imposed thereby *to be valid unless it* concludes that the ordinance is unlawful or *finds that the tax imposed is* excessive or *unreasonable; but the court shall not interfere with the reasonable*

---

[4] *Hoffman v. Borough of Neptune City*, 137 N.J.L. 485, 60 A. 2d 798 (1948); *Fetter v. City of Richmond*, 346 Mo. 431, 142 S.W. 2d 6 (19); *Martin v. Nocero Ice Cream Co.*, 269 Ky. 151, 106 S.W. 2d 64 (1937); *Peel v. Dummit*, 308 Ky. 399, 214 S.W. 2d 605 (1948).

discretion of the legislative body in selecting the subjects or *fixing the rates of tax. The court may declare invalid all or any portion* of the ordinance or of the *tax imposed* or *may reduce the rates of tax.*" (Emphasis supplied). We take these two sections together to mean that the legislative body is not, except as the Act itself provides limitations on the amounts of certain levies, limited as to the rate it may impose in the first instance; but that, if an appeal is filed pursuant to Section 6, the court may examine into the reasonableness of the tax and order a reduction if it finds that the legislative body has abused a reasonable discretion in fixing the rate. We must also conclude that while the Legislature intended that there should be an opportunity to obtain a judicial determination of the reasonableness of the rate, it intended to foreclose such examination unless made in the timely fashion it prescribed. Thus, the Legislature wisely placed a check on the possible excesses of municipalities at the same time ensuring them of the revenue sought in the absence of an attack promptly made. No taxpayer appeal under Section 6 was here taken;[5] why, we are not told.

For the foregoing reasons we affirm the order of the court below.

Theodore O. Rogers,
J.

---

[5] The appellants could certainly have mustered the twenty-five aggrieved taxpayers necessary for such an appeal. Further, in this connection, we believe that the reenactment of an ordinance required by Section 4 of The Local Tax Enabling Act to be advertised because of a change of rate is a "tax levied for the first time" from which a Section 6 appeal might be taken. *Compare Glassmoyer v. Owen J. Roberts School District*, 18 Ches. Co. Rep. 85 (1970).

Opinion by Judge Kramer, Concurring in Part and Dissenting in Part, June 8, 1972:

I concur with my brothers of the majority in their holding that the private parking operators (appellants) have not proven any improper classification or illegal subject matter for taxation in violation of the Pennsylvania or United States Constitutions.

I must register my dissent to the result of the majority opinion because I believe that the record supports an allegation of the Complaint, to wit, that this parking tax increase violates the Equal Protection Clause of the United States Constitution, as found in the Fourteenth Amendment, which, *inter alia,* reads:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

It is first necessary to point out that, under the decisional law, it was not necessary for these appellants to proceed under the statute to test the constitutionality of a tax measure as suggested by the majority. In the case of *Lynch v. Owen J. Roberts School District,* 430 Pa. 461, 465, 244 A. 2d 1, 3 (1968), the Pennsylvania Supreme Court stated:

> "While we agree with the general proposition that equity will not entertain an action where plaintiff has an adequate, statutory remedy at law, we also acknowledge the presence of an exception to that doctrine, existing where a taxing statute is made the subject of a *constitutional* challenge." (Emphasis included.)

Later the Court stated:

> "Finally, we note that the equity court, having once obtained jurisdiction because of the presence of a constitutional challenge to a taxing statute, may also dispose, as did the lower court here, of non-constitutional challenges as well." 430 Pa. at 466, 244 A. 2d at 3.

See also, *Campbell, et al. v. Coatesville Area School District*, 440 Pa. 496, 270 A. 2d 385 (1970). Following the holding in the *Lynch* case, *supra*, I would also pass upon the reasonableness of the tax increase. On its face, the Taxing Ordinance in question levies a 20 per cent tax upon all parking transactions of operators of non-residential parking places, including governmental parking authorities. However we should not analyze the Ordinance and the Record while wearing blinders to all of the facts.

This record conclusively proves that of the twelve private parking operator appellants, nine will sustain losses, and none of the others will earn more than about three per cent per year.

One of the appellants' exhibits (Plaintiffs' Exhibit No. 1) sets forth in great detail their financial operating facts of life. It is based upon what were, at the time of trial, the latest actual operating statistics for the first six months of 1970 and projecting the same revenues and expenses for the balance of the year. A statistical summary of those figures, giving effect to the increased parking tax (at the 20 per cent rate), proves better than a verbal description, what has happened to the parking business in the City of Pittsburgh.

Operator	Number of Locations	Total Gross Parking Revenue 1970	Total Income (Loss)	Income as of % of Revenue
Alco Parking Corp.	10	$1, 446, 446	(5,981)	-
William Penn Parking Lots	9	661, 571	(3,703)	-
Parking Service Corp.	3	1, 965, 264	(118,887)	-
Arena Parking Inc.	2	404, 048	729	0.2%
Fourth Avenue Parking Inc.	2	550,964	16,126	2.9%
William Penn Parking Garage Inc.	1	130, 613	(5,384)	-
Campus Parking Inc.	1	146, 136	(19,048)	-
Grant Parking Inc.	1	320, 178	(62,429)	-
Oliver Plaza Garage	1	282, 923	650	0.2%
Liberty Avenue Lots	1	175, 403	536	0.3%
Stanwix Auto-park	3	638, 895	(13,604)	-
Liberty Parking	7	146, 380	(41,906)	-
Meyers Parking System	1	1, 015, 188	17,377	1.7%
K-Seven Parking Co., includes St. Francis Hospital Lot	4	285, 549	(34,175)	-
Total	46	$8, 169, 558	(269,699)	-

It is possible that other operating expenses of the private parking operators also may have increased during the test period in question; but the record in this case does not support any argument that the total of all such possible other increases would have had the impact of the increased tax here in question.

The record shows that the appellants represent about 71 per cent of the total commercial parking spaces in the City, and that the public parking authorities represent about 25 per cent of such parking spaces. The public parking authority charges lower rates and suffered no losses;[1] further it pays no real estate taxes on realty used for parking, no business receipts taxes and no gross receipts taxes. Appellants enjoy no tax exemption.

The court below found that none of these appellants proved that they could not raise their parking rates so as to recover the increased tax levied by the City. The record indicates to me, however, that at least one of the appellants twice raised its parking rates with disastrous results, thus supporting appellants' argument that they would lose more money by raising parking rates. The majority correctly recognized that the 20 per cent tax rate is an unreasonable one based upon the facts submitted by the appellant parking operators. Under the holding of *Lynch, supra,* this Court could have voided this tax increase or remanded the case.

When most of the private taxpayer classification is caused to suffer financial losses (based upon an annual

---

[1] We can take judicial notice of the published financial reports of the Public Parking Authority of Pittsburgh, which show that it consistently has earned handsome annual profits, including the test year, 1970.

income statement) in the operation of their businesses resulting from an unreasonable tax increase, while at the same time the competitive governmental parking authority is permitted to use lower parking rates and realize profits because of its preferential treatment, via tax exemptions (on a total tax basis), I would hold that such private taxpayers have suffered a violation of their constitutional rights.

Under our free enterprise capitalistic system, the government was never intended to enter into competitive private businesses, except as may be justified under its police powers. When this Commonwealth instituted the authority approach to public services, it was never intended as an intentional and direct method of governmental competition with its citizens. Rather, it was intended as a means to circumvent the constitutional limitations on governmental indebtedness, where certain public services were in need of capital investment not otherwise available or provided by private citizens or businesses. Except for matters purely within a governmental function, government should not provide capital and labor to compete with its citizens. To some, who believe in some form of government other than that which we enjoy, the government should take over all businesses affecting the public interest. To them, in Pennsylvania, it would be appropriate for government to take over the steel mills and use government employees to run them, much like that which was done with the retail sale of liquor. Such a philosophical approach does violence to my understanding of our present system of government. Therefore I believe great caution should be taken to make certain that a competing government does not force the private busi-

nesses of our citizens out of existence by an arbitrary use of otherwise unrestricted taxing powers.

Private parking operations were a recognized private business long before governmental *parking* authorities came into existence.[2] Though the Legislature declared that these authorities were necessary for the public safety and welfare; and even if it could be proven that private enterprise had not the wherewithal to supply sufficient parking facilities for the public, the fact remains that once government entered this private business field it was given an unfair advantage over the private sector through tax exemptions. (*See* 53 P.S. 355.)

The record in this case indicates that the governmental parking authority competitor does not pay real estate taxes or gross receipts taxes to the City, while the appellants do pay such taxes. Authorities were not instituted for the purpose of making profits and therefore should show none. Parking authorities' parking rates are lower because of the legislative directions and advantages they receive. Apparently the private sector of the parking business survived, even with these differentials, for many years. But now, as the record shows, the City has raised the parking tax, here in question, to a point where most of the private sector is losing money in its overall operation. It doesn't take a graduate economist to understand that losing business ventures eventually go out of existence. This point is especially important when one realizes that after the authorities' bonds and other debts are paid in full the parking authority will go out of ex-

[2] See the Parking Authority Law, Act of June 5, 1947, P. L. 458, as amended, 53 P.S. 341 et seq.

istence, and all of its assets and business will be owned and operated by the City. (See 53 P.S. 354)

This is not a case where one or two marginal private operators are being forced out. *See Philadelphia v. Samuels,* 338 Pa. 321, 12 A. 2d 79 (1940). This is a case where most of the private operators are being forced out of business. It doesn't take a person with psychic powers to see that government, under such facts, will eventually take over all of the parking facilities in the City. Another five or ten per cent increase in this tax may complete the job.

I find this case to be one of the first impression in our courts. The debilitating effect upon a citizen's property rights due to a combination of an unreasonable high tax rate and direct governmental business competition, should be recognized. The new wrinkle in the aged face of the principle that the Legislature possesses unrestricted taxing powers, is the advent of government competing with the private business of its citizens; and this gives the picture a new appearance heretofore unviewed by the courts.

Mr. Justice Holmes, dissenting in the case of *Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U.S. 218, 223, 72 L. Ed. 857, 859 (1928), and in speaking generally of the taxing powers of the Legislature, said:

> "In those days [referring to the time of Mr. Chief Justice Marshall and *McCulloch v. Maryland,* 4 Wheat. 316, 17 S. Ct. 579 (1819)] it was recogized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and

> that the necessary alternative was to deny it altogether. But this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise to go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits. The power to fix rates is the power to destroy if unlimited, but this Court while it endeavors to prevent confiscation does not prevent the fixing of rates."

Mr. Justice Holmes expresses my sentiments.

I would hold that where government creates an unreasonable tax rate (as found by the majority) which forces private citizens to operate at a deficit, while simultaneously permitting competing governmental operations to continue operating at lower parking rates and with profits from such operation, owing to other tax exemptions, such a tax rate, as a part of the total city tax load imposed on its competition, is a denial of the Equal Protection Clause of the United States Constitution and in addition is illegally confiscatory.

In the Seventeenth Century, J. B. Colbert, Controller-General of Finance to Louis IV, offered a maxim widely accepted for its intrinsic merit:

> "The art of taxation consists in so plucking the goose as to obtain the largest amount of feathers with the least amount of hissing." Evans; Dictionary of Quotations; 680; 1st Ed. (1968).

In this case, even the life's blood of the proverbial goose is being drained.

The theory of government's power to tax beyond a reasonable limit, as stated by the majority, is axiomatic.

However, none of the cases cited goes so far as to make such a maxim absolute.

Once again I quote a Mr. Justice Holmes dissent. In the case of *Hyde v. U. S.*, 225 U.S. 347, 391, 56 L. Ed. 1114, 1135 (1912), he said:

> "It is one of the misfortunes of the law that ideals become encysted in phrases and thereafter for a long time cease to provoke further analysis."

The competition of a governmental parking authority adds a new dimension to the tax issues raised and from my point of view requires further analysis. If the government desires both an unreasonable high tax and an unfair competitive business position, it should be forced to prove the need for such a tax.

I would reverse and remand to permit the City to prove its need for this unreasonable tax increase.

Harry A. Kramer,
Judge.

Judge Mencer joins in this Opinion.
Judge Crumlish, Jr. joins in this Opinion.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. 1699 April Term, 1970
In Equity

Alco Parking Corporation; Arena Parking, Inc.; Campus Parking, Inc.; Fourth Avenue Parking, Inc.; Grant Parking, Inc.; Harry W. Sheppard, Jr., t/a Stanwix Auto Park; John Cominos, t/a Liberty Parking; John Stabile and Rocco A. Del Sardo, t/a Wm. Penn Parking Lot; K-Seven Parking Company; Meyers Bros. Parking-Central Corp.; Parking Service Corporation, Inc.; Wm. Penn Parking Garage, Inc.,

Plaintiffs

vs.

City of Pittsburgh,

Defendant

Before: Wessel, McKenna, McCarthy, JJ.

OPINION

Wessel, J.

This matter is before the court *en banc* on plaintiffs' exceptions to the findings of fact and conclusions of law of the Chancellor.

The plaintiffs have filed twelve (12) exceptions to the Chancellor's findings of fact and ten (10) exceptions to the Chancellor's conclusions of law and offered a supplemental brief in which the plaintiffs maintain warrant further discussion on the legal issues involved in this case.

The plaintiffs accuse the Chancellor of misconstruing their position on the various issues and misstated or omitted important facts and submit that rather than review each of the issues raised at trial and in the prior brief, plaintiffs wish only to supplement their prior brief on the two issues of "reasonable classification" and "confiscation."

Having considered plaintiffs' brief in conjunction with the exceptions filed by plaintiffs and after considering the testimony, we are compelled to conclude that the Chancellor did not misconceive the issues nor compound the misconception in his statement that the Parking Tax is "not a tax on 'business' of operating a parking facility" but a tax on "the transaction of parking for a consideration."

It is quite obvious to this Court that the only reason for filing exceptions to the Chancellor's findings of fact and conclusions of law is to give plaintiffs another opportunity for a rehash of the relevant issues heretofore spelled out by the Chancellor in his erudite opinion. The issues raised at the trial of this case were confiscation and classification.

Plaintiffs' brief cites the recent case of *Mellon Square Garage v. Public Parking Authority of Pgh.*, 275 A. 2d 654, to support the proposition that the Parking Tax is a business privilege tax. The *Mellon Square Garage* case

reached the Court on preliminary objections and concerned the interpretation of a sublease which provided for the payment of a rental based upon a percentage of gross receipts. By the terms of this lease, the gross receipts were not to include "the amount of sales or other similar tax required to be collected by the tenant or subtenant." The Court held that the tenant could not deduct the Parking Tax from the gross receipts set forth in the lease in question. We fail to see where this decision supports the proposition cited by the plaintiffs.

In the *University Club v. City of Pittsburgh*, 440 Pa. 562, Mr. Justice Eagen noted that the Parking Tax was a tax upon the transactions involved in parking motor vehicles. Finally, the Ordinance itself describes the tax as a tax on the transaction, not the privilege, of the parking procedure.

On the issue of uniformity, we would call plaintiffs' attention to the case of *Crosson v. Downingtown Area School District*, 440 Pa. 468 (1970) and a very recent opinion of Justice Pomeroy, *F. J. Busse Co. v. City of Pittsburgh* at No. 149 March Term, 1970, wherein Justice Pomeroy makes crystal clear the obligation and burden upon the taxpayer to demonstrate that the taxing classification is unreasonable when he stated:

> "The thrust of appellants' argument is that because the Ordinance imposes a tax on every person engaging in any business in the City, the City may not legitimately exclude any business from the burden of the tax, nor impose different rates of tax on those businesses which are not excluded. The obvious defect in appellants' position is that it fails to recognize that the taxing authority may distinguish

between various classes of taxpayers and that the rate of taxation need be equal only with respect to taxpayers who are within the same class. See e.g. *Commonwealth v. Life Assurance Co. of Pa.*, 419 Pa. 370, 376-78; *Allentown School District Tax Case*, 370 Pa. 161. The test of uniformity is whether there is a reasonable distinction and difference between the classes of taxpayers sufficient to justify different tax treatment. *Commonwealth v. Life Assurance Co. of Pa.*, supra; *Commonwealth v. Girard Life Insurance Co.*, 305 Pa. 558. In the instant case, several of the variations of which appellants complain are based upon specific limitations set by the Enabling Act itself, or by other statutes. Other challenged differences in treatment are necessitated because the Ordinance taxes only businesses, not employees, or because a business is conducted outside of the taxing jurisdiction of the City. Prior case law has established that the burden is upon the taxpayer to demonstrate that the taxing classification is unreasonable. *Wanamaker v. School District of Phila.*, 441 Pa. 567; *Commonwealth v. Life Assurance Co. of Pa.*, supra. Appellants have not met that burden in this case."

The Pennsylvania cases are clear that the test of uniformity is whether there is a reasonable distinction and difference between classes of taxpayers. Plaintiffs cannot argue that the parking business which has been separately classified for regulatory purposes cannot also be classified for the purposes of taxation.

There is no question, in our opinion, that the City of Pittsburgh Parking Tax is a valid exercise of the taxing power of the City of Pittsburgh.

We must further conclude that the burden is upon the plaintiffs to demonstrate that the taxing classification is unreasonable. The law and the evidence cited by the Chancellor in his adjudication point to but one conclusion and that is the plaintiffs have not met that burden in this case.

All of the issues that plaintiffs now raise on exceptions were considered in the Chancellor's adjudication and appropriately disposed of. Accordingly, rather than have a rehash of the legal as well as the evidentiary aspects, we adopt the Chancellor's adjudication as our adjudication in this case.

It is difficult for this Court to understand how the plaintiffs can theorize what was material and what the Chancellor considered in arriving at his particular findings and conclusions. Needless to say, it is the Chancellor's duty, sitting in equity, to consider all of the testimony irrespective of the plaintiffs' opinion as to its relevancy before arriving at a just and equitable decision.

We find nowhere in the record that the Chancellor has misstated or misconstrued the facts or the issues. On the contrary, we reach the conclusion that the Chancellor has based his findings of fact on the probative evidence produced at the trial of this case and reached his conclusions of law based upon the real issues and the law. We are, therefore, compelled to dismiss plaintiffs' exceptions to the Chancellor's adjudication.

Opinion, Court of Common Pleas

FINAL DECREE

AND NOW, to-wit, this 14th day of July, 1971, after hearing and consideration of counsels' arguments and the testimony in this case, and for the foregoing reasons, plaintiffs' exceptions one to twenty-two inclusive be and the same are hereby dismissed.

IT IS FURTHER ORDERED that the costs of this proceeding shall be borne by the plaintiffs and the decree nisi dated March 19, 1971, shall be entered as a final decree herein.

By the Court,
Wessel,
J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA CIVIL DIVISION

No. 1699 April Term, 1970
In Equity

Alco Parking Corporation; Arena Parking, Inc.; Campus Parking, Inc.; Fourth Avenue Parking, Inc.; Grant Parking, Inc.; Harry W. Sheppard, Jr., t/a Stanwix Auto Park; John Cominos, t/a Liberty Parking; John Stabile and Rocco A. Del Sardo, t/a Wm. Penn Parking Lot; K-Seven Parking Company; Meyers Bros. Parking-Central Corp.; Parking Service Corporation, Inc.; Wm. Penn Parking Garage, Inc.

Plaintiffs,

vs.

City of Pittsburgh,

Defendant.

ADJUDICATION

Wessel, J.

This matter is before the Court on a complaint in equity filed by the plaintiffs against the defendant, City of Pittsburgh, to obtain certain equitable relief by restraining the defendant from enforcing the provisions of Ordinance

No. 704, approved December 31, 1969, and from imposing a license tax under the Ordinance for the parking facilities operated by the plaintiffs and, in addition thereto, claim a refund of any taxes paid as a result of the enforcement of Ordinance No. 704, and such other relief as the Court may deem proper.

The defendant filed an answer to the complaint and the issues raised by the pleadings are as follows:

1. Whether the Parking Tax Ordinance violates Article IX, Section 1 of the Pennsylvania Constitution (Uniformity Clause) and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; and

2. Whether the Parking Tax Ordinance violates Article IX, Section 1 of the Pennsylvania Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution in that said Ordinance imposes a rate which is so excessive and unreasonable as to amount to a confiscation of the plaintiff's property.

The plaintiffs contend that Ordinance No. 704 of the City of Pittsburgh violates the Pennsylvania Constitution, as well as the United States Constitution, in that the tax imposed by the Ordinance is not uniform and that they have been denied equal protection of the law—first, because of lack of uniformity and, secondly, the tax is excessive to a degree that amounts to confiscation of their property.

The defendant takes the opposite position and the matter is now before the Court for disposition.

Adjudication, Court of Common Pleas

FINDINGS OF FACT

After hearing testimony and examining the exhibits presented in this case, and the briefs of respective counsel, and upon consideration thereof, the Court finds the following facts:

1. The plaintiffs are private individuals and corporations engaged in the operation of parking lots and garages within the City of Pittsburgh.

2. Defendant, City of Pittsburgh, is a city of the second class, organized and existing under the laws of the Commonwealth of Pennsylvania.

3. Ordinance No. 704 (the Parking Tax Ordinance) was enacted by the City of Pittsburgh in 1969, became effective on February 1, 1970, and provided for a 20% tax on the gross receipts of nonresidential parking operations within the City of Pittsburgh.

4. Ordinance No. 704 superseded and replaced Ordinance No. 674 which was the Parking Tax Ordinance enacted by the City of Pittsburgh in 1968, which established a tax rate of 15% of the gross receipts of all parking operations within the City of Pittsburgh.

5. Ordinance No. 674 superseded and replaced Ordinance No. 434, which was the original Parking Tax Ordinance enacted by the City of Pittsburgh in 1962, which established a tax rate of 10% of the gross receipts of all parking operations within the City of Pittsburgh.

6. Each of the Parking Tax Ordinances was enacted pursuant to the "Local Tax Enabling Act" now amended

and reenacted as the Act of December 31, 1965, P. L. 1257, paragraph 1, et seq., as a general revenue measure.

7. The City Council of the City of Pittsburgh in Ordinance No. 704 asserted, as its justification for separately classifying the parking business for the purpose of special taxation, that nonresidential parking lots and garages, by reason of the frequency rate of their use, the changing intensity of their use at various hours of the day, their location, their relationship to traffic congestion and other characteristics, present problems requiring municipal services and affect the public interests.

8. The Pennsylvania Legislature in the Parking Authority Law, 1947, June 5, P. L. 458, paragraph 1, as amended, 53 P.S. §341, et seq., stated that a parking crisis exists in the City of Pittsburgh. To alleviate that crisis, it authorized the creation of a public parking authority.

9. In findings of fact set forth in Section 2 (53 P.S. 342) in the Parking Authority Law, the Legislature detailed the causes of traffic congestion and the problems created thereby, and further stated the need for both public and private parking operations to relieve such traffic congestion and the problems arising therefrom.

10. The findings of the Pennsylvania Legislature in the Parking Authority Law continued to be valid, as shown by recent studies which state that there is a current deficiency of 4,100 parking spaces in downtown Pittsburgh, in spite of the existence of a total of 24,000 parking spaces within the City of Pittsburgh, of which plaintiffs herein operate 17,471 parking spaces.

11. The existence of public, business and entertainment facilities in the metropolitan area of Pittsburgh, such as, department stores, movies, theaters, hotels, restaurants, bars, office buildings, municipal buildings, etc. are the reasons for the flow of vehicular traffic to and from the City and are the generators of traffic congestion.

12. Parking lots and garages owned by the Public Parking Authority of the City of Pittsburgh, which were created pursuant to the Parking Authority Law and which are operated by lessees and managers for lessees, some of whom are plaintiffs in this case, are identical in their function, operation and purpose as the private parking garages and lots owned and operated by the plaintiffs.

13. Parking operators, including the plaintiffs herein, make substantial investments in each parking operation by pledging their credit by signing long-term leases continuing guaranteed annual rentals.

14. Plaintiffs herein have paid all parking taxes required under the various City of Pittsburgh Parking Tax Ordinances from the inception of the tax to the institution of this action.

15. All other parking lot and garage operators in the City of Pittsburgh, private and nonprivate, including the garages and/or operated by the Pittsburgh Parking Authority are also subject to and paid the parking taxes imposed by the various Parking Tax Ordinances.

16. The 1970 revenues outlined in plaintiffs' Exhibit 1 are based not on actual receipts, but on ratios established in 1969, therefore, assuming the exhibits for 1970 to be the same as those for 1969.

17. Some garages are missing from various operations of plaintiffs listed in plaintiffs' Exhibit No. 1, their absence serving to distort the projection.

18. Plaintiffs' expert failed to compute net profits as part of the projection in plaintiffs' Exhibit No. 1.

19. The demand for parking spaces in the City of Pittsburgh far exceeds the supply.

20. None of the plaintiffs have increased their rates since February of 1970.

21. Plaintiffs have not attempted to pass on the increased tax to the parking lot patrons.

22. Forty per cent (40%) of the cars in the Golden Triangle during rush hours are either going to or just leaving parking garages.

23. This is a period of economic inflation with increased labor costs, interest rates, construction costs and other factors which affect the expansion plans, day-to-day operations, and profits of the plaintiffs.

24. The plaintiffs' expert considered only the financial conditions of the plaintiffs in this case and not that of the parking industry as a whole in compiling plaintiffs' Exhibit No. 1.

25. Comparison of the gross receipts of the plaintiffs' operations with the parking taxes paid in 1968 and 1969 shows that plaintiffs have a net increase in the amount of revenue left after taxes but before other expenses were deducted in those years.

26. Fifty per cent (50%) of the downtown area of the City of Pittsburgh is either used for streets or for parking lots.

27. The City of Pittsburgh experienced only a temporary reduction in the number of cars parked at its facility on the Wharf after it doubled its price for parking.

DISCUSSION

Pursuant to the "Local Tax Enabling Act" of 1964, 53 P.S. 6901 et seq., the Council of the City of Pittsburgh enacted Ordinance No. 704, approved December 31, 1969, providing for the levying, assessment and collection of a 20% tax on the transaction of parking motor vehicles on nonresidential parking lots, including those lots operated by the Public Parking Authority of the City of Pittsburgh and other nonprofit organizations, beginning with the tax year 1970 and annually thereafter.

The plaintiffs, private individual corporations engaged in the operation of parking lots and garages within the City of Pittsburgh, filed a complaint in equity attacking the validity of the Parking Tax Ordinance and seek to enjoin the collection of the said tax.

In 1962 the City of Pittsburgh imposed a tax of 10% upon the gross receipts derived from commercial parking transactions (Ordinance No. 434, approved December 27, 1962). In every consecutive year from 1962, the parking tax was reenacted. In December of 1968, Ordinance No.

674 reenacted this tax to increase the rate to 15% upon the gross receipts from commercial parking transactions. Ordinance No. 704 of 1969, the ordinance involved in the instant case, follows the same basic pattern as previous ordinances but increased the tax to 20%.

Section 3 of Ordinance No. 704 provides as follows:

> "Imposition of Tax: A tax for general revenue purposes is hereby imposed upon all transactions of each operator with respect to each nonresidential parking place at the rate of 20 per centum (20%) of the gross receipts from all such transactions received during the year 1970, and thereafter, from year to year on a calendar year basis."

Section 2 (e) defines "operator" to include the Public Parking Authority of the City of Pittsburgh and nonprofit corporations which store or park cars for a consideration.

Section 2 (c) of the Ordinance defines the nonresidential parking place subject to the tax as follows:

> " 'Nonresidential Parking Place' or 'Parking Place'—any place within the City, whether wholly or partially enclosed or open, at which motor vehicles are parked or stored for any period of time in return for a consideration not including:
>
> "(i) any parking area or garage to the extent that it is provided or leased to the occupants of a residence on the same or other premises for use only in connection with, and as accessory to, the occupancy of such residence and

"(ii) any parking area or garage operated exclusively by an owner or lessee of a hotel, an apartment hotel, tourist court or trailer park, to the extent that the parking area or garage is provided to guests or tenants of such hotel, tourist court or trailer park for no additional consideration.

"As used herein, the term 'residence' includes (i) any building designed and used for family living or sleeping purposes other than a hotel, apartment hotel, tourist court or trailer park, and (ii) any dwelling unit located in a hotel or apartment hotel."

The defendant disagrees with the plaintiffs and argues that the classification of nonresidential parking businesses for the purpose of taxation is a reasonable and valid classification under Article VIII, Section 1 of the Pennsylvania Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and cites *Philadelphia v. Samuels*, 338 Pa. 321; *Sley System Garages v. Philadelphia*, 338 Pa. 321; *C. A. McGillick v. City of Pittsburgh*, 415 Pa. 581; *University Club v. City of Pittsburgh*, 271 A. 2d 221 (1970).

The *Samuels* and *Sley* cases concern the parking tax levied by the City of Philadelphia on the transaction of parking in an open parking lot and said tax in the amount of 10% was levied upon the gross receipts of the parking lot operator.

The defendants raised the issue of classification and argued that the Philadelphia Municipal Council did not have reasonable grounds to establish the classification of parking lots. This same issue was raised by the plaintiffs in the instant case.

The Court held that "the separation of open parking lots from closed garages and placing them in separate classes for the purpose of taxing the parking transaction in the open lot cannot be said to constitute an unreasonable and arbitrary difference of classification."

In the *McGillick* case, which involved the initial Pittsburgh Parking Tax Ordinance, thirty-three (33) parking lot operators raised the issue of the legality of the classification of "commercial" parking lots for tax purposes. The Court held:

> "We believe that the placing of commercial parking places in a taxable class and placing residential parking places in a nontaxable class is a realistic and practical classification. The Stonier-Bruner Act itself enjoins the Court not to 'interfere with the reasonable discretion of the legislative body in selecting the subjects or fixing the rates of the tax'."

In the *University Club v. City of Pittsburgh* case, supra, the Court upheld the authority of the City to levy a tax on the nonresidential parking transaction. Mr. Justice Eagen, speaking for the Court, said:

> "That the City had the power to tax the appellant in the manner in which it did we think is evident from the Local Tax Enabling Act, Act No. 481 of June 25, 1947, P. L. 1145, reenacted and clarified by Act No. 511 of December 31, 1965, 53 P.S. §6902 (1970 Supp.) (The Tax Anything Act). The act conferred upon political subdivisions the power to levy taxes upon all subjects of taxation which the Commonwealth has the power to tax but which it

has not so exercised. Section 2 (7) of the 1965 Act contains the only restriction on taxing private social organizations:

. . .

"Since parking transactions for which a consideration is paid are nowhere mentioned in the exception, it is a reasonable assumption that they are proper subjects of taxation."

In the face of these clearly cut decisions we find no merit in the plaintiffs' position that the decisions only validated the subclassification and did not establish the validity of the classification of the parking business for the purpose of a tax.

As we see it, the instant tax is not a tax on the "business" of operating a parking facility but is on the transaction of parking for a consideration and includes nonprofit organizations as well as business enterprises. And further, the courts have repeatedly emphasized the broad discretion of the legislative body to establish classifications for tax purposes. See *Coe v. Duffield,* 185 Pa. Super. 532; *Philadelphia v. Smith,* 412 Pa. 262; *Philadelphia v. Depuy,* 431 Pa. 276.

We feel the plaintiffs have gone a little afield in presenting their position and the points upon which they base their arguments, i.e., that the Parking Authority Act limits municipal taxing power; that businesses that confer a public benefit have special tax status; that all business should be uniformly taxed; that the rate of tax should be adjusted to meet the cost of regulation; and that liability for other taxes is a factor in determining uniformity of a given tax.

Adjudication, Court of Common Pleas

We all agree that commercial parking facilities are essential for a metropolitan community and are required to preserve the shopping and business areas of the community, but desirability or nondesirability of a service or business is not the basis upon which to hinge the imposition of a tax.

The Parking Authority Law, supra, has nothing to do with the taxing power of the municipality. The limitations of the Local Tax Enabling Act govern the municipality and, in effect, establishes the basis upon which the City, in the exercise of reasonable judgment, may establish a tax.

In the instant case the City reached the conclusion that the parking lot transactions which provide services and a convenience to non-City residents who otherwise pay no taxes and which produce certain problems of traffic control and supervision, is a reasonable class for the production of municipal revenue.

In addition, the same General Assembly that enacted the Public Parking Authority Act also enacted legislation to empower municipalities to regulate and license commercial parking facilities in the public interest. (See Act of June 5, 1947, P. L. 458, as amended)

If the General Assembly wished to give commercial lot operators tax exemptions or privileged status, such exemption could have been written into either the Parking Authority Law or even Act 511 itself. In the absence of such a mandate, the parking business or parking customer has no claim to privileged status.

In *Philadelphia v. Depuy*, 431 Pa. 276, Mr. Justice Roberts, in his opinion at page 279, stated:

"We start with the well-established proposition that one seeking to show a statute unconstitutional must carry a very heavy burden. This doctrine was most recently reiterated in *Commonwealth v. Life Assurance Co. of Pennsylvania,* 419 Pa. 370, 214 A. 2d 209 (1965), appeal dismissed for want of a substantial federal question, 384 U.S. 268, 86 S. Ct. 1476 (1966), where we held that although there must be some reasonable basis for distinguishing one taxable from another, it is the allegedly aggrieved taxpayer who must demonstrate the lack of such basis. 'All doubt is to be resolved in favor of sustaining the legislation.' *Milk Control Commission v. Battista,* 413 Pa. 652, 659, 198 A. 2d 840, 843 (1964); *Anstine v. Zoning Board of Adjustment,* 411 Pa. 33, 190 A. 2d 712 (1963). Moreover, the taxpayer's burden will be deemed met only if the challenged statute *'clearly, palpably* and *plainly* violates the Constitution.' *Daly v. Hemphill,* 411 Pa. 263, 271, 191 A. 2d 835, 840 (1963) (Emphasis in original); *Chartiers Valley Joint Schools v. Allegheny County Board of School Directors,* 418 Pa. 520, 546, 210 A. 2d 487, 501 (1965). The court below found that appellants failed to carry their heavy burden of showing that there existed no reasonable basis for distinguishing gas from electric companies. We agree."

While the plaintiffs argue there are numerous causes of traffic congestion and that persons use commercial areas for a variety of reasons, the fact remains that the parking facility is a special convenience to the parker, Pittsburgh resident and non-resident alike, and that the use of such facilities at peak hours and the resulting traf-

fic congestion of entrance and exit are attributes which are "unique" to this particular operation. (See T-390)

Parking facilities serve the cars of patrons using the restaurants, bars, department stores, office buildings, hospitals and any other operation which serves as a focus for human activity, but these inter-relationships do not remove the unique characteristics of the parking transaction. Persons using and parking cars place a different burden on the municipality than persons utilizing public transportation.

As previously pointed out, the Supreme Court has clearly approved the classification of the nonresidential parking transaction for the purpose of taxation. The General Assembly has singled out the parking "business" for the purpose of regulation and Section 6 of Act 511, 53 P.S. Supp. 6906, states "that the courts shall not interfere with the reasonable discretion of the legislative body in selecting the subjects or affixing the rates of the tax."

The only limitation placed upon the power of the Legislature to distinguish between various entities for purposes of taxation is that their basis for doing so be reasonable. See *Commonwealth v. Life Assurance Co. of Pa.*, 419 Pa. 370.

We are compelled to conclude, therefore, that the plaintiffs have failed to carry their heavy burden of showing that there existed no reasonable basis for the classification of distinguishing one taxable or class of taxables from another.

As long as a valid distinction between classes or between overlapping members of one class and another exist, the wisdom of the legislative policy is not a matter

for the courts. See *Commonwealth v. Lafferty*, 426 Pa. 541 (1967).

All of the issues raised by the plaintiffs, viz., double taxation, the Public Parking Authority being exempt from a property tax, and the question of double taxation as well as uniformity, have been heretofore considered and disposed of by the Supreme Court. See *McGillick v. Pittsburgh*, supra; *Plumley v. Philadelphia School District*, 182 Pa. Super. 122; *University Club v. City of Pittsburgh*, supra; *Commonwealth v. Life Assurance Co. of Pa., supra; Tax Review Board v. Devine*, 184 Pa. Super. 297; and *Williams & Co. v. School District of Pittsburgh*, 438 Pa. 509.

Accordingly, we will address ourselves, therefore, to the issue raised by plaintiffs that the Parking Tax Ordinance violates Article IX, Section 1 of the Pennsylvania Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution in that the Ordinance imposes a rate which is so excessive and unreasonable as to amount to a confiscation of the plaintiffs' property. The plaintiffs, in raising this issue, argue that they are unable to pass on the parking tax and, due to the 20% parking tax, the parking business in Pittsburgh has become unprofitable.

An examination of the record convinces us that the plaintiffs are continuing in business and making a profit from such operations, although the profit may not be as great a margin as plaintiffs may feel they are entitled and take the position that their operating costs, at a rate of less than 10%, represents confiscation of its business. We must hasten to point out that the record shows the following:

1. There remains a parking shortage of 4,000 spaces within the City of Pittsburgh. (T-300)

2. The five-point increase in taxes of from 15% to 20% has not been passed on to parking lot customers. (T-114, 170, 301-302)

3. The gross receipts reported by parking lot operators increased between 1968 and 1969 and remained stable between 1969 and 1970 despite the tax increase. (T-400)

4. Statistical exhibits prepared by plaintiffs show a reduction in return from 10% but indicate that even peripheral lots continue to operate at a profit. (T-141)

5. Decreased return is due to increased labor costs and other factors as well as tax liability. (T-161, 307)

Based on these pertinent facts, we can only conclude that the plaintiffs are suggesting to the Court that they are entitled to a rate of 10% or more on their operating costs. Otherwise, a rate of less than 10% would amount to confiscation of plaintiffs' business. To this we need only reiterate Mr. Justice Linn's opinion in *Philadelphia v. Samuels*, supra:

"Little need be said on the point that the ordinance is confiscatory. The State expressly authorized the City to levy taxes for general revenue purposes and the ordinance so provides. There is nothing in the record to show that the rate imposed by the ordinance is so high as to result in taking property without due process. The probability is that, in

effect, the tax will be passed on to patrons, but if it is not, and if an occasional operator cannot afford to continue in business and pay the tax, it may be unfortunate but will not render the ordinance invalid."

We do not feel the Court should be asked to decide the question of reasonable return of profit any more than the Court should be compelled to decide what subjects upon which the City proposes a tax, or the type of a tax. These subjects are not for the Court.

As we see it, the parking tax, is a tax on the privilege of operating a parking business or a tax on the income of the operator but, rather, a tax on the *transaction* of parking for a consideration. Plaintiffs' recourse, like the City itself, remains to recoup its tax liability, as well as its labor costs and similar increased costs of operation from persons using the parking facility. (T-402)

The City of Pittsburgh and the plaintiffs are agreed that the commercial areas of the City must grow and prosper and parking facilities are important for such growth. But, in the exercise of its discretionary power, Council has felt that an increase in tax on the parking transaction would not be detrimental to the welfare of the City.

The plaintiffs may suffer some dimunition in income but even proven economic disadvantage is not sufficient to establish confiscation. *Commonwealth v. Life Assurance Co. of Pa.*, supra.

We are compelled to conclude, therefore, that plaintiffs' reduced margin of profit is not sufficient to meet the burden of establishing confiscation.

Adjudication, Court of Common Pleas

CONCLUSIONS OF LAW

1. This court sitting in equity has jurisdiction of the parties and of the subject matter of this proceeding.

2. The City of Pittsburgh has the power to enact Ordinance No. 704 of 1970 pursuant to the Local Tax Enabling Act, Act 511 of December 31, 1965, 53 P.S. §6901 et seq.

3. The separate classification of the nonresidential parking lots and garages for taxation purposes is valid and reasonable.

4. The burden of proving that a classification is unreasonable rests solely and heavily on the party attacking the classification.

5. When a piece of legislation is attacked, all doubts are to be resolved in favor of sustaining the legislation.

6. The Parking Authority Law, Act of June 5, 1947, P. L. 458, paragraph 1, as amended, 53 P.S. 341, et seq., is irrelevant and immaterial to the within proceeding.

7. General revenue taxes, unlike license fees, need demonstrate no relationship between the amount of money collected under the general revenue measure and the amount of expense involved in servicing the taxed parties.

8. A nondiscriminatory tax, such as the parking tax, does not become constitutionally tainted because certain members of the class which it taxes, and not others of the same class, must pay other taxes imposed by other valid tax laws.

9. The Pittsburgh Parking Tax is a tax upon the *transactions* involved in parking motor vehicles, while the Pittsburgh Business Privilege Tax is a tax upon the privilege of doing business in the City of Pittsburgh. There is no double taxation involved.

10. The City of Pittsburgh Parking Tax is neither confiscatory nor violative of due process.

11. A tax rate which allows facilities to operate at a fair rate of return is not confiscatory, even though a few borderline operations may falter by the way.

DECREE NISI

AND NOW, to-wit, this 19th day of March, 1971, after hearing and consideration of counsel's arguments and the testimony in this case, and for the foregoing reasons, it is ordered, adjudged and decreed that the action in equity filed by the plaintiffs to enjoin the operation of Ordinance No. 704 of 1969, the Parking Tax Ordinance of the City of Pittsburgh, be and the same is hereby dismissed.

IT IS FURTHER ORDERED AND DECREED that if no exceptions are filed hereto within twenty (20) days of notice of filing this adjudication, the decree nisi shall be entered by the Prothonotary upon praecipe as a final decree herein in accordance with Rule of Civil Procedure No. 1519(a).

By the Court,
Wessel,
J.

Ordinance No. 704

NO. 704

AN ORDINANCE—To provide for the general revenue by imposing a tax of 20 per centum upon the transactions involved in parking motor vehicles at parking places, other than residential parking places, as measured by the gross receipts received therefrom by the operators thereof; requiring a license and the payment of the tax as a condition to the conducting of such transactions; providing for the levy and collection of such tax; prescribing requirements for returns and records; conferring powers and duties upon the Treasurer; and imposing penalties.

WHEREAS, Non residential parking places for motor vehicles, by reason of the frequency rate of their use, the changing intensity of their use at various hours of the day, their location, their relationship to traffic congestion and other characteristics, present problems requiring municipal services and affect the public interest, differently from parking places accessory to the use and occupancy of residences; and

WHEREAS, a tax for general revenue purposes upon the transactions involved in parking or storing motor vehicles at non residential parking places would therefore be appropriate; and

WHEREAS, it is necessary in the public interest to increase the parking tax rate for the year 1970; Now, Therefore,

THE COUNCIL OF THE CITY OF PITTSBURGH, UNDER THE AUTHORITY OF ACT NO. 511 OF 1965, AND ITS AMENDMENTS, HEREBY ENACTS AS FOLLOWS:

Ordinance No. 704

Section 1. Title: This ordinance shall be known as the "Parking Tax Ordinance."

Section 2. Definitions: As used in this ordinance, unless the context indicates clearly a different meaning, the following words and phrases shall have the meanings set forth below:

(a) "City"—the City of Pittsburgh.

(b) "Person"—any natural person, partnership, unincorporated association or corporation, non profit or otherwise. Whenever used in any provision prescribing a fine or a penalty, the word "Person", as applied to partnerships, shall mean the partners thereof, as applied to unincorporated associations, shall mean the members thereof, and as applied to corporations, shall mean the officers thereof.

(c) "Non-Residential Parking Place" or "Parking Place"—any place within the City, whether wholly or partially enclosed or open, at which motor vehicles are parked or stored for any period of time in return for a consideration not including:

(i) any parking area or garage to the extent that it is provided or leased to the occupants of a residence on the same or other premises for use only in connection with, and as accessory to, the occupancy of such residence, and (ii) any parking area or garage operated exclusively by an owner or lessee of a hotel, an apartment hotel, tourist court or trailer park, to the extent that the parking area or garage is provided to guests or tenants of such hotel, tourist court or trailer park for no additional consideration.

As used herein, the term "residence" includes (i) any buliding designed and used for family living or sleeping purposes other than a hotel, apartment hotel, tourist court or trailer park, and (ii) any dwelling unit located in a hotel or apartment hotel.

The terms "hotel", "apartment hotel", "tourist court", "trailer park" and "dwelling unit" are used herein as defined in the Zoning Ordinance, Ordinance No. 192, approved May 10, 1958, as amended.

(d) "Month"—a calendar month.

(e) "Operator"—any person conducting the operation of a parking place or receiving the consideration for the parking or storage of motor vehicles at such parking place; the term does not include the City but does include the Public Parking Authority of the City of Pittsburgh and does include operators on premises of Public Parking Authority of the City of Pittsburgh and non profit corporations which store or park vehicles for a consideration.

(f) "Transaction"—the transaction involved in the parking or storing of a motor vehicle at a non-residential parking place for a consideration.

(g) "Consideration"—refers to consideration received upon an express or implied contract or under a lease or otherwise, whether or not separately stated, and whether or not paid, provided or allowed by the person on whose behalf the motor vehicle is parked or stored or by some other person.

(h) "Gross Receipts"—the monetary amount of the aggregate consideration from transactions.

(i) "Treasurer"—the Treasurer of the City of Pittsburgh.

Section 3. Imposition of Tax: A tax for general revenue purposes is hereby imposed upon all transactions of each operator with respect to each non-residential parking place, at the rate of 20 per centum (20%) of the gross receipts from all such transactions received during the year 1970, and thereafter, from year to year on a calendar year basis. No persons shall conduct such transactions without complying with all the provisions of this ordinance and paying the tax hereby imposed.

Section 4. Annual License: No operator shall conduct the operation of a non-residential parking place without obtaining for each parking place an annual license from the Director of the Department of Public Safety of the City of Pittsburgh as required by Ordinance No. 435, approved December 27, 1962, within the time specified. Any operator not possessing such license for each parking place for the year 1970 or any following year shall obtain such license within thirty (30) days after the effective date of this Ordinance, and any person who intends to begin conducting the operation of a non-residential parking place shall obtain such a license before beginning such operation. At each parking place, the operator shall display the license in a conspicuous location at all times. Such licenses shall not be transferable between one operator and another or between one parking place and another. Any operator who ceases to conduct the operation of a parking place shall notify the Treasurer and return the license applicable thereto.

Section 5. Records: Each operator shall maintain, separately with respect to each parking place, complete

and accurate records of transactions and of gross receipts of all transactions. Each operator shall issue to the person paying consideration, written evidence of such transactions or classes of transactions as the Treasurer may prescribe by regulations. Where consideration in a transaction is not separately stated, the operator shall maintain such evidence and records as are necessary to segregate the consideration applicable to the transaction. Each operator shall afford the Treasurer and his designated employees and agents access to all such records and evidence at all reasonable times and shall provide verification of the same as the Treasurer may require.

The Treasurer and agents designated by him are hereby authorized to examine the books, papers and records of any operator or supposed operator in order to verify the accuracy of any return made, or if no return has been made, to ascertain the tax due. Every such operator, or supposed operator, is hereby directed and required to give to the Treasurer, or any agent designated by him, the means, facilities and opportunity for such examinations and investigations, as are hereby authorized.

Section 6. Returns and Payments: Each Operator, upon forms prescribed by the Treasurer shall file, on or before April 30, July 31, October 31, of the current tax year, and January 31, of the following year, returns showing gross receipts received with respect to each parking place during the respective three-month period ending on the last day of any month preceding the month in which the return due date occurs. At the time of filing the return, the operator shall pay to the Treasurer all tax due for the period to which the return applies.

Any operator who for the preceding quarterly period has failed to pay over the proper amount of tax to the Treasurer may be required by the Treasury to file subsequent returns and pay the tax monthly. In such cases, payments of the tax shall be made to the Treasurer on or before the last day of the month succeeding the month for which the tax was due.

The City Treasurer is hereby authorized to accept payment under protest of the amount of parking tax claimed by the City in any case where the taxpayer disputes the validity or amount of the City's claim for tax. If it is thereafter judicially determined by a court of competent jurisdiction that the City has been overpaid, the amount of the overpayment shall be refunded to the taxpayer.

Any operator who ceases to conduct the operation of a parking place shall notify the Treasurer and pay all taxes due in thirty (30) days.

Section 7. Treasurer's Powers and Duties. The Treasurer, on behalf of the City, shall receive and collect the taxes, interest, fines and penalties imposed by this ordinance, and shall maintain records showing the amounts received and the dates such amounts were received. The Treasurer shall adopt and enforce regulations relating to any matter pertaining to the administration of this Ordinance, including, but not limited to, requirements for evidence and records and forms for applications, licenses and returns.

Section 8. Collection: The Treasurer shall collect, by suit or otherwise, all taxes, interest, costs, fines and penalties due under this Ordinance and unpaid. If for

any reason, any tax is not paid when due, interest at the rate of six per cent (6%) per year on the amount of unpaid tax and an additional penalty of one-half of one per cent (½ of 1%) of the amount of unpaid tax for each month or fraction of month during which tax remains unpaid shall be added and collected. Whenever suit is brought for the recovery of unpaid tax the operator shall, in addition, be liable for the costs of collection as well as for interest and penalties.

Section 9. Violations: Any person who violates any provision of this Ordinance or any regulation adopted pursuant to it shall, upon conviction thereof before any alderman or magistrate, be liable for a fine of not more than three hundred dollars ($300.00) or, in default of payment of such fine, shall be imprisoned in the Allegheny County Jail or Allegheny County Workhouse for a period not exceeding thirty (30) days.

Section 10. Severability. If a final decision of a court of competent jurisdiction holds any provision of this Ordinance, or the application of any provision to any circumstances, to be illegal or unconstitutional, the other provisions of this Ordinance, or the application of such provision to other circumstances, shall remain in force and effect. The intention of Council is that the provisions of this Ordinance shall be severable and that this Ordinance would have been adopted if any such illegal or unconstitutional provisions had not been included.

Section 11. Ordinance No. 674, approved December 28, 1968, entitled "An Ordinance to provide for the general revenue by imposing a tax of 15 per centum upon the transactions involved in parking motor vehicles at commercial parking places, as measured by the gross re-

ceipts received therefrom by the operators thereof; requiring a license and the payment of the tax as a condition to the conducting of such transactions; providing for the levy and collection of such tax; prescribing requirements for returns and records, conferring powers and duties upon the Treasurer; and imposing penalties" shall remain in effect until the effective date of this Ordinance.

Section 12. Effective Date. This Ordinance shall become effective February 1, 1970, and shall remain in effect thereafter from year to year on a calendar year basis.

Section 13. That any Ordinance or part of Ordinance, conflicting with the provisions of this Ordinance, be and the same is hereby repealed so far as the same affects this Ordinance.

Passed December 29, 1969.

Approved December 31, 1969.

Ordinance Book 71, Page 254.

FILED
OCT 27 1973
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-582

CITY OF PITTSBURGH,

Petitioner,

vs.

ALCO PARKING CORPORATION; ARENA PARKING, INC.; CAMPUS PARKING, INC.; FOURTH AVENUE PARKING, INC.; GRANT PARKING, INC.; HARRY W. SHEPPARD, JR., t/a Stanwix Auto Park; JOHN COMINOS, t/a Liberty Parking; JOHN STABILE and ROCCO A. DEL SARDO, t/a Wm. Penn Parking Lot; K-SEVEN PARKING COMPANY; MEYERS BROS. PARKING-CENTRAL CORP.; PARKING SERVICE CORPORATION, INC.; WM. PENN PARKING GARAGE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR RESPONDENTS IN OPPOSITION

LEONARD BOREMAN,
RICHARD H. MARTIN,
BASKIN, BOREMAN, WILNER, SACHS, GONDELMAN & CRAIG,
Attorneys for Respondents,
1018 Frick Building,
Pittsburgh, Pa. 15219,
(412) 562-8645.

LEONARD M. MARKS,
GOLD, FARRELL & MARKS,
Special Counsel for Respondent, Meyers Bros. Parking-Central Corporation,
595 Madison Avenue,
New York, New York 10022.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX TO BRIEF.

	PAGE
Counter-Questions Involved	1
Counter-Statement of the Case	2
Argument	8
I. This Court should not review the decision of the Supreme Court of Pennsylvania holding the Pittsburgh Parking Tax Ordinance of 1970 invalid in the context of the policy of the Pennsylvania Legislature as set forth in the Parking Authority Law of 1947	8
II. The Supreme Court of Pennsylvania was correct in its holding that in this "rare and special instant" and the "special competitive circumstances of this case" the City's 20% gross receipts tax was an arbitrary and invalid exercise of the City's taxing power	12
III. The Record below overwhelmingly supports the finding of the Supreme Court of Pennsylvania that 20% gross receipts parking tax is confiscatory	20
Conclusion	26

TABLE OF CITATIONS.

CASES.

Alaska Fish Co. v. Smith, 255 U. S. 44, 49, 41 S. Ct. 219 (1921) 16

Bowman v. Kansas City, 361 Mo. 14, 233 S. W. 2d 26 (1950) 17

Gate City Garage v. City of Jacksonville, 66 So. 2d 653 (Fla. 1953) 17

Jayne v. City of Detroit, 348 U. S. 802 (1954) 17

A. Magnano Co. v. Hamilton, 292 U. S. 40, 47, 54 S. Ct. 599 (1934) 16

McGillick v. City of Pittsburgh, No. 85 January Term, 1963, aff'd. *per curiam*, 415 Pa. 581, 203 A. 2d 481 (1964) 4, 14

PAGE

McSorley v. Fitzgerald, 359 Pa. 264, 59 A. 2d 142, 145 (1948) 10
Philadelphia v. Eglin's Garages, Inc., 342 Pa. 142, 19 A. 2d 845 (1941) 4, 14
Philadelphia v. Samuels, 338 Pa. 321, 12 A. 2d 79 (1940) 4, 14, 15
Public Parking Authority, *et al.* v. City of Pittsburgh, Court of Common Pleas of Allegheny County, No. 687 July Term, 1972; Commonwealth of Pennsylvania, No. 97 C. D. 1973 6
Puget Sound Power and Light Co. v. Seattle, 219 U. S. 619, 54 S. Ct. 542 (1934) 17
Veazie Bank v. Fenno, 75 U. S. (8 Wall.) 482 (1869) . 18

STATUTES.

Parking Authority Law, Act of June 5, 1947, P. L. 459 ..... 1, 4, 9, 10, 16
§ 1, as amended, 53 P. S. § 341 *et seq.* 3, 8
§ 2, as amended, 53 P. S. § 342 ..... 4, 10, 13, 19

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-582

CITY OF PITTSBURGH,

Petitioner,

vs.

ALCO PARKING CORPORATION; ARENA PARKING, INC.; CAMPUS PARKING, INC.; FOURTH AVENUE PARKING, INC.; GRANT PARKING, INC.; HARRY W. SHEPPARD, JR., t/a Stanwix Auto Park; JOHN COMINOS, t/a Liberty Parking; JOHN STABILE and ROCCO A. DEL SARDO, t/a Wm. Penn Parking Lot; K-SEVEN PARKING COMPANY; MEYERS BROS. PARKING-CENTRAL CORP.; PARKING SERVICE CORPORATION, INC.; WM. PENN PARKING GARAGE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR RESPONDENTS IN OPPOSITION

Counter-Questions Involved

1. Should this Court review a determination by the Supreme Court of Pennsylvania holding invalid a municipal tax ordinance because the City imposed an arbitrary, excessive and unreasonable tax of 20% of the gross receipts of private parking operators while itself engaging in direct privileged competition through its Parking Authority, all contrary to the intention of the State Legislature expressed in the Pennsylvania Parking Authority Law of 1947?

2. Should this Court review a determination of the Supreme Court of Pennsylvania holding a municipal 20% gross receipts tax on private parking operators to be so arbitrary, excessive and unreasonable in conjunction with direct favored competition from the City Parking Authority and contrary to expressly enacted state legislative intent, that in this "rare and special instance" and "the special competitive circumstances of this case" the tax was confiscatory and deprived private operators of their property without due process of law?

3. Should this Court review the determination of the Supreme Court of Pennsylvania that an overwhelming factual demonstration had been made that the City, through the imposition of an excessive and unreasonable 20% gross receipts tax and the direct competition of its public parking authority, contrary to expressly enacted state legislative intent, had appropriated virtually all the economic benefits and earnings of the private operators?

Counter-Statement of the Case

Initially, this litigation involved a suit in equity by respondents to enjoin the collection of a parking tax imposed pursuant to Ordinance No. 704 of the City of Pittsburgh, enacted December 31, 1969, which became effective on February 1, 1970, and for a refund of taxes paid thereunder. During the pendency of this lawsuit, however, the City of Pittsburgh enacted a new parking tax ordinance, Ordinance No. 30 of 1973, effective April 1, 1973, which superseded Ordinance No. 704, the parking tax ordinance challenged herein. Unlike the challenged ordinance that imposed upon the parking operators a 20% tax on the gross receipts of each non-residential parking operation, the new ordinance imposed a tax of 20% upon the consideration paid by the

patrons of a non-residential parking place for each parking transaction, to be collected from the patron by the operator of each such non-residential parking place (A. 23a).[1] Therefore, the request for injunctive relief has been rendered moot, while the only question remaining is the right of respondents to obtain a refund for taxes paid under former Ordinance No. 704 of the City of Pittsburgh.[2]

The Supreme Court of Pennsylvania held the superseded 1970 tax ordinance invalid upon respondents' factual showing that the excessive and unreasonable 20% tax imposed on their gross receipts, when taken in conjunction with direct competition by the taxing body in the same business, rendered it impossible for a substantial majority of the private parking industry to operate at any profit whatsoever. The Supreme Court of Pennsylvania held that such result was contrary to the intent and purpose of the Legislature of Pennsylvania when it passed the Parking Authority Law, 1947, June 5, P. L. 459, § 1, as amended, 53 P. S. § 341, *et seq.*

As stated by petitioner (P. 5), respondents own all but 4% of the private parking spaces in the downtown area of the City of Pittsburgh, amounting to approximately 71% of the total downtown parking spaces, while the Parking Authority of the City of Pittsburgh controls the balance of

---

[1] References designated by "A" are to pages of the Appendix filed by Petitioner.

References designated by "P" are to pages of the Petition of the City of Pittsburgh For a Writ of Certiorari to the Supreme Court of Pennsylvania.

References designated by "R" are to pages of the record filed in the Supreme Court of Pennsylvania.

[2] The Supreme Court of Pennsylvania remanded the case to the Court of Common Pleas to determine the "nature and extent" of the refund to which respondents may be entitled. (A. 27a)

such spaces. The creation of the Parking Authority was initially authorized by the Pennsylvania Legislature by enactment of the Parking Authority Law, *supra*, with the express intention, as stated in the law itself, that:

> "The authority cooperate with all existing parking or parking terminal facilities, or both, so that private enterprise and government may mutually provide adequate parking services for the convenience of the public." 53 P. S. § 342(i) (A. 21a, 22a)

In 1962, the City of Pittsburgh enacted, for the first time, a tax on non-residential parking facilities at a rate of 10%. This tax, which was a predecessor of the tax now subject to this litigation, was challenged, *inter alia*, on the ground that it was confiscatory, but said challenge was unsuccessful. *McGillick v. City of Pittsburgh*, No. 85 January Term, 1963, *aff'd per curiam*, 415 Pa. 581, 203 A. 2d 481 (1964). The Court in *McGillick*, relying on *Philadelphia v. Eglin's Garages, Inc.*, 342 Pa. 142, 19 A. 2d 845 (1941) and *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940), held that the record therein was insufficient "to indicate that the tax rate of 10% of the gross receipts is excessive or confiscatory".

In 1968, the City of Pittsburgh enacted a new parking tax ordinance, which superseded the 1962 ordinance and raised the rate of taxation to 15% of the gross receipts of non-residential parking operators.

In challenging the 1970 parking tax ordinance, which again increased the tax rate to 20% of gross receipts, respondents presented uncontroverted evidence of their inability to make a profit from the vast majority of their operations as a result of the high rate of the tax, their inability to pass the tax on to their patrons, and the favored

competition of government-operated parking facilities.[3] The record, which contains an unprecedented revelation by respondent parking operators of their financial records,[4] clearly demonstrates that the City of Pittsburgh parking tax requires respondents to pay 34⅓ times the taxes of other businessmen within the City (R. 179a), that private parking operators as a class are suffering devastating losses and have no opportunity to make a profit at substantially all of their facilities (Pl. Ex. 1, R. 507a-616a; A. 71a), and that competition at lower rates from the Pittsburgh Parking Authority, which is an arm of city government, effectively prohibits respondents from price increases designed to offset the effects of the unreasonably high parking tax (A. 14a, 16a, 17a, 18a). The City produced no evidence at trial which contradicted these facts.

Both the Commonwealth Court and the Supreme Court of Pennsylvania found these facts established by the record and further found that many of the Chancellor's findings were erroneous and unsupported by the record. Each of the appellate courts agreed that the 20% gross receipts tax

---

[3] The court below found on the basis of the evidence produced by respondents that:

> ". . . as the gross receipts tax increases from the original ten percent to the present 20 percent the percentage and number of parking lots unable to achieve any profit doubles. Again based on projections for 1970, when compelled to pay the 20 percent gross receipts tax, 65 percent of the individual lots would sustain operating losses. If the tax had remained at 15 percent, only 37 percent of the lots would fail to earn a profit. If the tax was reduced to its original ten percent then only 30 percent of the lots would sustain losses." (A. 15a)

[4] Respondents produced extensive, detailed financial statements of their individual parking operations. See Plaintiffs' Exhibit 1 (R. 507a-616a) See also the uncontested summary of 1970 operations set forth in the opinion of the Commonwealth Court. (A. 71a)

was excessive and unreasonable on the factual showing made in this case and that the operators were unable to pass on the tax (A. 14a-18a, 23a-24a, 61a-63a, 70a-72a).

The Pennsylvania Commonwealth Court found that:

> "1. There are about 24,300 parking spaces in the City of Pittsburgh. Of this number 6100 are served by a public parking authority, subjected to this tax, but exempt from other taxes including those on real estate.[5] Of the balance of about 18,000 spaces, the plaintiffs here owned or operated about 17,000.
>
> 2. Based upon six months' operations and a sound statistical projection for the balance of the year 1970 with expenses computed at 1969 rates, that portion of the industry represented by appellants, would, during the year 1970, earn gross revenues of over $8,000,000, pay $1,600,000 on account of this tax and sustain a loss of $270,000. Of the fourteen appellant enterprises nine would sustain losses and of the others the one showing the largest profit would earn an amount equal to only 2.9% of its gross revenues.
>
> 3. The appellants are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher taxes but also because the appellants are in competition with a public authority which, exempt from other taxes, can charge less.
>
> 4. The rate of tax was increased from fifteen per centum effective in 1969 to twenty per centum, although in 1969 the appellants lost $26,000 on gross revenues of about $7,700,000 on which they paid a tax under this ordinance of more than $1,400,000." (A. 62a, 63a).

---

[5] Although the Pittsburgh Parking Tax Ordinance of 1970 expressly includes the Parking Authority as subject to the tax, the Court of Common Pleas of Allegheny County in *Public Parking Authority, et al. v. City of Pittsburgh*, No. 687 July Term, 1972, has ruled that the Parking Authority is exempt from this tax since its parking garages being "public property used for public purposes" are exempt from *all* taxes. This case is now pending on appeal before the Commonwealth Court of Pennsylvania, No. 97 C. D. 1973.

The Pennsylvania Supreme Court found that:

"After the imposition of the 20 percent gross receipts tax appellants' projected figures for 1970 show that out of 14 different parking lot operators in downtown Pittsburgh nine would sustain operating losses. Of the five operators earning a profit only two would achieve a return of one percent or better. The highest return projected for any of the 14 operators in 1970 was 2.9 percent (A. 14a-15a).

• • •

"The Commonwealth Court unanimously agreed that the tax was imposed at an unreasonable rate . . . [and] . . . also unanimously agreed, contrary to the chancellor's findings, that 'appellants' [sic] are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher rates but also *because the appellants are in competition with a public authority which, exempt from other taxes, can charge less.* (Emphasis added)" (A. 16a)

• • •

"Appellants, on this record, have shown that more than 'an occasional operator cannot afford to continue in business'. However, the chancellor found that appellants have made no significant attempt to pass the tax on to the consumer. As noted previously the Commonwealth Court was of the unanimous opinion that the tax could not be passed on to the consumer because of the competition from the Public Parking Authority. Clearly if the private parking lot operators attempted to pass the full burden of the tax on to the consumers they would only succeed in increasing the disparity in the already disparate rates. For example, at the all-day rates shown in the record, if appellants were to attempt to pass the tax on to their patrons, their rates would increase from an average of $3.00 to $3.60, while a similar tax pass-on by the Public Parking Authority would increase their average rate from $2.00 to $2.40. Thus the differential in rates would increase from $1.00 to $1.20. (A. 17a-18a)

• • •

"As appellants emphasize it is doubtful that the state Legislature ever intended the public parking authorities utilizing public financing advantages, to compete directly with private parking operators in this fashion. In fact, the declaration of policy in the Parking Authority Law of 1947* specifically provides: '. . . That it is intended that the authority cooperate with all existing parking facilities so that private enterprise and government may mutually provide adequate parking services for the convenience of the public;' Act of June 5, 1947, P. L. 458, § 2, as amended, 53 P. S. § 342. Nonetheless, Pittsburgh parking operators are now not only denied the cooperation intended in the statute, but are actually confronted with direct, adverse competition from the Public Parking Authority." (A. 21a-22a)

ARGUMENT

I

This Court should not review the decision of the Supreme Court of Pennsylvania holding the Pittsburgh Parking Tax Ordinance of 1970 invalid in the context of the policy of the Pennsylvania Legislature as set forth in the Parking Authority Law of 1947.

The petition is an attempt to have this Court review the decision of the highest court of Pennsylvania holding invalid an unreasonable and confiscatory city tax of 20% of the gross receipts of parking operators when combined with privileged public competition from the State-created Pittsburgh Parking Authority.[6]

---

* Parking Authority Law, Act of June 5, 1947, P. L. 459, §§ 1 *et seq.*, as amended, 53 P. S. §§ 341 *et seq.*

[6] Justice Roberts, speaking for the majority, stated:

"By taking 20 percent of gross revenues 'off the top' the City effectively confiscates what were formerly the earnings of the parking lot owners. This confiscation is practically as complete as if the City had condemned without compensation the private lots to erect public facilities." (A. 23a)

The Supreme Court of Pennsylvania found that the City of Pittsburgh by combining the crippling 20% tax with deliberate competition of its Parking Authority, which enjoyed lower rates, real estate tax exemptions and public financing, had completely altered and undermined the intention of the Legislature of the Commonwealth of Pennsylvania in creating the Parking Authority Law of 1947.

Justice Roberts, writing for the Court, concluded that the State Legislature had never contemplated nor intended public parking facilities to compete on a favored basis with private parking operators to the detriment of the private segment of the industry. Rather, the State Legislature specifically provided that the Parking Authority was to cooperate with private enterprise, for the benefit of the municipality, rather than force the private operators out of business as Pittsburgh was doing.

The Supreme Court of Pennsylvania found:

> "This Court has heretofore not had occasion to hold a tax to be so excessive and unreasonable as to compel the conclusion that it was not the proper exertion of taxation, but a confiscation of property. However, this Court has not previously had presented to it a controversy where the taxing body was in direct competition, as here, with private enterprise and simultaneously imposed a burdensome gross receipts tax on all competitors in that activity (including itself). This is undeniably a 'rare and special circumstance' where the due process clause imposes strict constraints upon the exercise of the legislative taxing power.
>
> "As appellants emphasize it is doubtful that the State Legislature ever intended the public parking authorities utilizing public financing advantages, to compete directly with private parking operators in this fashion. In fact, the declaration of policy in the Parking Authority Law of 1947 specifically provides: '. . . That it is intended that the authority cooperate with

all existing parking facilities so that private enterprise and government may mutually provide adequate parking services for the convenience of the public;' Act of June 5, 1947, P. L. 458, § 2, as amended, 53 P. S. § 342. Nonetheless, Pittsburgh parking operators are now not only denied the cooperation intended in the statute, but are actually confronted with direct, adverse competition from the Public Parking Authority." [7] (A. 20a-22a.)

The Pennsylvania Supreme Court had earlier sustained the constitutionality of the Parking Authority Law on the basis of these findings and held that the State Legislature specifically intended a marriage of public aid and private initiative in solving the parking crisis. In *McSorley v. Fitzgerald*, 359 Pa. 264, 59 A. 2d 142, 145 (1948), it held:

"Not only is the declaration of legislative findings in the present Act impressive in pointing out the urgent need of legislation of this type, but the conditions it

---

[7] The Legislature of Pennsylvania enacted the Parking Authority Law after having determined that a parking crisis existed in cities of the Second Class, of which Pittsburgh is one, which required a joint cooperative effort between private and governmental enterprise. Section 2 of said Act reads in part:

"(g) That this *parking crisis*, which threatens the welfare of the community *can be reduced* by providing sufficient off-street parking or parking terminal facilities, or both . . .;

(i) That it is *intended that the authority cooperate with all existing parking or parking terminal facilities, or both so that private enterprise and government may mutually provide adequate parking services for the convenience of the public.*" (Emphasis added) Parking Authority Law, 1947, June 5, P. L. 458, § 2, as amended, 53 P. S. § 342.

The same conclusion concerning State Legislative intent had been reached by Judge Kramer writing for the minority of the Commonwealth Court:

"Authorities (referring to the Public Parking Authority) were not instituted for the purpose of making profits and, therefore, should show none." (A. 74a) Contrary to the expressed intention of the State Legislature, however, the Pittsburgh Parking Authority "consistently has earned handsome annual profits." (A. 72a, Footnote 1).

portrays are well known to all inhabitants of our larger cities. It is unfortunate that many operators of automobiles habitually ignore the fact highways are intended primarily for travel and not for the storage of vehicles other than by way of transistory stops for loading and unloading. The congestion caused by such misuse of the streets and by the ever-increasing amount of motor vehicles traffic has become a major problem of municipal administration,—a problem particularly acute in a city like Pittsburgh where it is aggravated by the concentration of the downtown business section in a 'Golden Triangle' of comparatively narrow streets and tall office and commercial buildings, many of the occupants of which use private automobiles to and from their offices and stores. Studies made by the Pittsburgh Regional Planning Association and the Allegheny Conference on Community Development reveal that parking facilities in the city are grossly inadequate and that private enterprise has not been able to solve the problem because private parking lots are frequently temporary in nature and located without much regard for actual parking requirements, vacant land being utilized for parking purposes in more or less haphazard fashion merely for the purpose of earning taxes on the land pending profitable disposition of it for construction purposes. Under such circumstances, as was said in *Belovsky v. Redevelopment Authority of Philadelphia*, 357 Pa. 329, 339, 54 A. 2d 277, 283, 172 A. L. R. 953, 'public aid must accompany private initiative if the desired results are to be obtained.'" 59 A. 2d 142 at 145.

In sum, in the case now before this Court, the decision of the Supreme Court of Pennsylvania was based largely on an interpretation of the Legislative intent in passing the Pennsylvania Parking Authority Law and the conflict between the State's intent and the tax passed by the City of Pittsburgh. The intimate relationship of these matters of interpretation of state law with the constitutional issue raised, makes this case particularly inappropriate for review by this Court.

II

The Supreme Court of Pennsylvania was correct in its holding that in this "rare and special instance" and the "special competitive circumstances of this case" the City's 20% gross receipts tax was an arbitrary and invalid exercise of the City's taxing power.

Contrary to the assertions of petitioner, the issue raised in this litigation does not involve a determination of whether the due process clause limits the power of a legislative body to raise revenue by means of taxation. Nor did the court below suggest that government may not enter fields previously occupied by private enterprise and even afford public facilities competitive advantages. At stake here is a narrow issue which was explicitly decided by the Supreme Court of Pennsylvania on the unique facts of this record—whether the City of Pittsburgh acted arbitrarily, and contrary to state legislative policy, in imposing an unreasonable and excessive 20% gross receipts tax on the private sector of the parking industry under circumstances which prohibited the private operators from passing the tax on to their patrons in the form of increased prices because of the favorable competitive position of the City's own Parking Authority.

As stated above, of prime importance is the recognition by the Pennsylvania Supreme Court that the Pennsylvania Legislature did not intend that the Public Parking Authority gain a superior competitive position or cause the demise of the private parking business in favor of public control.[8]

[8] While petitioner suggests that there is a distinction between the City of Pittsburgh, the taxing body herein, and the Pittsburgh Public Parking Authority and, therefore, the competition actually arises from a different governmental source, it is quite clear that this argument is spurious and attempts to elevate form over substance. Regardless

(Footnote continued on following page)

While recognizing the importance of public and private cooperation within the parking industry, as did the Legislature of Pennsylvania, the Supreme Court of Pennsylvania emphasized the extraordinary advantage that the Pittsburgh Parking Authority is able to exert over the private parking operators such as the former's ability to charge lower rates due to its exemption from real estate taxes and the long term, low interest public financing not available to private businessmen. Justice Roberts found that such advantages:

> ". . . reduce significantly the rates charged by the Authority, and increases the intensity and degree the nature of its direct competition with private parking lot operators. It is certainly undeniable that the Parking Authority is able to finance its site and construction costs through the attractive medium of long term, lower interest public financing, with all the benefits which attend such governmental arrangements, not

---

(Footnote continued from preceding page)
of the labels used to describe the Public Parking Authority, it is clear that it is, in fact, an arm of the City of Pittsburgh. First, its Chairman and all of its board members, who establish rates for and control operations at all Authority facilities, are appointed by the Mayor of the City of Pittsburgh and are directly responsible to his office; second, it is a matter of public record that, from 1966 through 1970, inclusive, the City of Pittsburgh has derived revenues from the operation of the Public Parking Authority in the amount of $1,626,154.00, (see Annual Report of the City Controller for Fiscal Year Ended December 31, 1966, at p. 30; 1967 at p. 30; 1968 at p. 36; 1969 at p. 36; 1970 at p. 37. These documents are kept as public records in the offices of the City of Pittsburgh), and third, the debt of the Public Parking Authority is now computed as a debt of the City of Pittsburgh for purposes of the total debt limitations of the City under the provisions of the Local Government Unit Debt Act, 1972, July 12, P. L. ____, No. 185, § 101; 53 P. S. § 11-202, 209.410. In fact, the only relevant factor pertaining to the Public Parking Authority which is not controlled by, or responsible to, the City of Pittsburgh was the act of the Legislature of the Commonwealth providing the mechanism by which said Authority could come into existence, and this was only at the option of the local governmental body. See Parking Authority Law, Act of June 5, 1947, P. L. 458, § 2 as amended, 53 P. S. § 342.

available to private businessmen. See Price v. Philadelphia Parking Authority, 422 Pa. 317, 335, 221 A. 2d 138, 148 (1966). It is the combination of these factors which creates the extraordinary advantage which the Public Parking Authority is able to exert over the non-governmental parking lot owners and operators." (A. 22a, 23a)

The Court's references to the public competitive advantage, however, do not imply that public competition is barred, but emphasize the fact, established by the record, that in the unique circumstances in this case, the City's imposition of a prohibitive 20% gross receipts tax, while at the same time extending the competitive advantage of the public facilities, all contrary to state legislative policy, was arbitrary and rendered the ordinance invalid. Moreover, the Court found that this unique combination of facts destroyed the profitability of the private sector of the industry and, therefore, amounted to a governmental taking of private property.

In reaching this result, the Supreme Court of Pennsylvania is consistent with its prior rulings in *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940) and other cases,[9] that a municipal parking tax would be held invalid where a proper and substantial record demonstrated that more than an occasional operator could not make a profit and that the tax could not be passed on to the parking customers (A. 23a).

The factors accounting for the decision in favor of the respondents in this case, in contrast to the results in the *Samuels*, *Eglin's Garages* and *McGillick* cases, were the

[9] The result herein was also forewarned in *Philadelphia v. Eglin's Garages, Inc.*, 342 Pa. 142, 19 A. 2d 845 (1941), and *McGillick v. City of Pittsburgh*, No. 85 January Term, 1963 (Court of Common Pleas of Allegheny County), aff'd. *per curiam*, 415 Pa. 581, 203 A. 2d 481 (1964).

imposition of the prohibitive 20% rate, rather than the 10% rate in the prior cases, and the ability of respondents to demonstrate on the record a financial condition so deteriorated as to meet the two-pronged *Samuels* test.[10]

In addition, this case presented the palpable violation of state legislative policy whereby the city-owned facilities, rather than cooperating with private operators, increased their competitive advantage to the extent of destroying the private sector. This factor alone distinguishes all of the authorities cited by petitioner.

As the Supreme Court of Pennsylvania held:

> ". . . it is unnecessary for private lot operators to prove that they cannot pass the tax onto their customers (although as previously noted the Commonwealth Court found this was not possible). See Samuels, supra; Eglin, supra. Clearly by raising their rates the private operators would greatly increase the already significant rate differential between private and public parking lots. The public competition thus effectively prohibits private lot operators from increasing their rates and passing the tax on to their patrons, while the imposed tax appropriates whatever earnings were formerly produced. Where such an unfair competitive advantage accrues, generated by the use of public funds, to a local government at the expense of private property owners, without just compensation, a clear constitutional violation has occurred." (A. 23a, 24a)

Petitioner urges this Court to accept review, urging that the decision of the Supreme Court of Pennsylvania runs contrary to prior holdings of this Court. The Supreme

---

[10] This accounts for the extraordinary financial record of the respondents' parking operations for the year 1970; nine of the fourteen parking enterprises show projected losses and, of the others, the one showing the largest profit would earn an amount equal to only 2.9% of its gross revenues (Pl. Ex. 1, R. 507a-616a) For a detailed analysis of respondents' financial plight see the chart cited in the record and reproduced in the Appendix herein. (A. 71a)

Court of Pennsylvania was expressly cognizant of the cases in this Court which have held that it is rare for courts to strike down tax legislation. The court below cited and relied upon the principles contained in those decisions which expressly authorize judicial intervention in extreme instances where the legislature was shown to have acted arbitrarily in imposing a prohibitive tax (A. 18a-20a). See *e.g. A. Magnano Co. v. Hamilton*, 292 U. S. 40, 47, 54 S. Ct. 599 (1934). After reviewing the authorities that suggest that an excessive tax "standing alone" is not sufficient for judicial intervention, the Pennsylvania Supreme Court further noted that:

> ". . . these same courts have acknowledged that in exceptional circumstances the taxing power of the Legislature may be abused, and, if so, it would violate both the Fifth and Fourteenth Amendments." (A. 19a)[11]

The Court thereupon held that the combination of factors shown on this record relating to the effect of the prohibitive tax *in combination with favored governmental competition* renders the action of the City of Pittsburgh in imposing such a high rate of taxation to be arbitrary, especially when viewed in the context of state policy in the Parking Authority Law (A. 21a, 22a).

None of the cases cited by petitioner contain the following three elements on which the Pennsylvania Supreme Court based its opinion: (1) a tax found by the highest court of the state as well as its intermediate appellate court to be so excessive and unreasonable as to confiscate virtually all profits of all of the private sector of the industry; (2) direct public competition in the same industry;

---

[11] Similarly, Mr. Justice Holmes, in *Alaska Fish Co. v. Smith*, 255 U. S. 44, 49, 41 S. Ct. 219 (1921), stated:

> "We need not consider whether abuses of the power might go to such a point as to transcend it, for we have not such a case before us."

and (3) leading to a result in the industry directly contrary to legislative intent and policy in authorizing public entry into the field.

Puget Sound Power and Light Co. v. Seattle, 219 U. S. 619, 54 S. Ct. 542 (1934), upon which petitioner relies, is totally inapposite to the facts of this case. The basic issue there was not whether the tax was arbitrary and confiscatory, but whether there was a denial of equal protection in taxing a private light and power utility, when there existed a government-owned public utility in the same business. The tax in *Puget Sound* was very small, 3%, as compared to 20% here, there was no claim that the tax was excessive or unreasonable and there was no evidence that any private company had suffered financial losses by reason of the tax, or that its continued existence was in jeopardy. Nor was the taxing statute in *Puget Sound* in conflict with state legislative policy, which had created a public utility regulated monopoly. Finally, in *Puget Sound*, the highest court of the state had sustained the municipal licensing tax, finding no constitutional infirmity. In this case, the Pennsylvania Supreme Court, interpreting state policy, invalidated the City of Pittsburgh's parking tax.

Contrary to the assertion of petitioner, *Jayne v. City of Detroit*, 348 U. S. 802 (1954) does not support its position. *Jayne* was not even decided on its merits by this Court but was dismissed for want of a substantial federal question. Moreover, the *Jayne* case, as well as *Gate City Garage v. City of Jacksonville*, 66 So. 2d 653 (Fla. 1953) and *Bowman v. Kansas City*, 361 Mo. 14, 233 S. W. 2d 26 (1950), do not even involve taxes, but raise only the question as to whether public competition is permitted in fields previously occupied by private enterprise.

Finally, *Veazie Bank v. Fenno*, 75 U. S. (8 Wall.) 492 (1869), is similarly inapposite. That case turned on a basic issue of federalism, whether the national government could tax and restrain state bank franchises under national currency powers without violating the reserved powers of the states. 75 U. S. at 547. This Court held that state-created banking institutions were not exempt from federal taxation and that Congress, through its currency and taxing powers, could restrict state circulation of bank notes in order to encourage national banks. No such issue of federalism is presented here. Rather, the highest state court of Pennsylvania has concluded that a municipality's tax was contrary to state legislative intention. *Veazie* also raised the issue of the separation of powers between co-equal federal branch in this Court's review of congressional taxing and currency powers. In the present case, the state court's review of a municipal tax ordinance in the context of state enabling legislation, does not raise any similar issue concerning separation of powers.

Neither the Supreme Court of Pennsylvania nor the respondent taxpayers have argued that the City of Pittsburgh may not compete in the parking industry, or even tax the parking industry while at the same time competing in it. In addition, respondents have not challenged the City of Pittsburgh's or the Pittsburgh Parking Authority's right to employ whatever inherent advantages they have at their disposal, such as the ability to charge lower rates due to exemption from real estate taxes, and low interest, long term financing. The basic evil challenged by respondents and struck down by the Court was a prohibitive 20% tax "off the top", which deprives respondents of any opportunity for profit in an industry where the taxing body, by its ability to compete advantageously, also precludes

the respondent taxpayers from any attempt to recapture their profits by raising their parking rates. This unique situation exists in the context of a specific Pennsylvania legislative enactment of policy that public and private parking industry should cooperate, not compete, in alleviating the parking crisis.[12]

The record in this case demonstrates that, with a 20% gross receipts tax, and direct privileged public competition, there is no conceivable way the majority of respondents, representing 95% of the private parking industry, can make any profit whatsoever. Under these circumstances, the court below correctly found respondents' property to have been, in effect, confiscated by the City government through its arbitrary tax (A. 26a).

Petitioner also asserts that the effect of the decision below will be to destroy the ability of the City government to provide services (P. 21). This argument is not only a *non sequitur*, but is baseless in view of the care with which the Pennsylvania Supreme Court restricted the scope of its decision to the particular facts and circumstances and state legislative intentions presented on this record, which enabled it to conclude that:

> ". . . the unreasonably burdensome 20 percent gross receipts tax, causing the majority of private parking lot operators to operate their businesses at a loss, *in the special competitive circumstances of this case*, constitutes an unconstitutional taking of private property without due process of law in violation of the Fourteenth Amendment of the United States Constitution." (A. 26a) (Emphasis supplied)

---

[12] Parking Authority Law, 1947, June 5, P. L. 458, § 2; 53 P. S. Ann. § 342.

III

The Record below overwhelmingly supports the finding of the Supreme Court of Pennsylvania that the 20% gross receipts parking tax is confiscatory.

The decision of the Supreme Court of Pennsylvania rests upon an overwhelming factual demonstration that the Pittsburgh 20% gross receipts tax is arbitrary, unreasonable and confiscatory. The devasting impact of the tax on the entire parking industry in the City of Pittsburgh is demonstrated by the financial statements contained in the Record below. In location after location, these statements establish the confiscatory effect of the 20% tax in conjunction with the direct favored competition of the Pittsburgh Parking Authority. The 1970 figures show the following results:

Operator	Number of Locations	Total Gross Parking Revenue 1970	Total Income (Loss)	Income as % of Revenue	Record Reference
Alco Parking Corp.	10	$1,446,446	(5,981)	—	R. 515a
William Penn Parking Lots	9	661,571	(3,703)	—	R. 533a
Parking Service Corp.	3	1,965,264	(118,887)	—	R. 549a
Arena Parking Inc.	2	404,048	729	0.2%	R. 557a
Fourth Avenue Parking Inc.	2	550,964	16,126	2.9%	R. 562a
William Penn Parking Garage Inc.	1	130,613	(5,384)	—	R. 567a
Campus Parking Inc.	1	146,136	(19,048)	—	R. 571a
Grant Parking Inc.	1	320,178	(62,429)	—	R. 575a
Oliver Plaza Garage	1	282,923	650	0.2%	R. 576a
Liberty Avenue Lots	1	175,403	536	0.3%	R. 577a
Stanwix Auto-Park	7	638,895	(13,604)	—	R. 581a
Meyers Parking System	1	1,015,188	17,377	1.7%	R. 685a
K-Seven Parking Co., includes St. Francis Hospital Lot	4	285,549	(34,175)	—	R. 609a
Total Industry	46	$8,169,558	(269,699)	—	

Detailed examination of the financial statements of individual respondents reinforces the conclusion that the 20% gross receipts tax is confiscatory. Meyers Brothers' Chatham Center Garage, for example, increased its gross parking revenues from $967,325 in 1969 to $1,015,188 in 1970—an increase of approximately $48,000. At the same time, by more efficient management, Meyers Brothers was able to reduce its operating expenses by about $12,000. Despite the increased gross revenue and decreased expenses in 1970, Meyers Brothers did worse than the year before—because the 20% tax increased by over $62,000 to a staggering burden of $198,977 (R. 606a). Because of this, Meyers Brothers' $1 million gross hardly produced any net profit at all. Meyers Brothers' profits dropped from 6.4% in 1968 under a 10% tax, to 3% in 1969 under a 15% tax to 1.7% in 1970 under the 20% tax (R. 606a).

This pattern is reflected throughout respondents' financial documents. A typical location, Sixth and Penn Garage indicates a 1970 gross of $370,455 with an operating loss of $23,902 at the 20% tax rate. Had the tax remained at 15%, the loss would have been $6,862. At a 10% rate there would have been a profit of $11,660, a return of 3.1% on the 1970 gross (R. 80a-81a).

The entire Stanwix Auto Parking operation with a gross of $638,895 in 1970 lost $13,604 at the 20% tax rate. At a 15% rate there would have been a profit of $15,631, a 2.4% return on the $638,895 gross (R. 81a). Total parking revenues for Alco Parking for 1970 were $1,446,446, leading to a $5,981 loss under the 20% tax. Had the tax remained at the 15% rate, there would have been a $56,755 profit, returning 3.9% of the gross (R. 82a).

Seymour Gline, the Vice President of Meyers Parking Systems in charge of 200 national locations, testified that it was not financially feasible for a major parking operator to realize a profit with the 20% parking tax in effect (R. 279a). Moreover, Mr. Gline testified that he was not aware of any major parking operation in the United States which makes a profit of 20% of gross receipts (R. 279a-280a). Major operator Harry Shepard, Jr., also testified that the 20% tax has also deprived Pittsburgh's parking operators of the ability to sell their businesses (R. 171a).

Throughout this litigation, the City of Pittsburgh has ignored respondents' evidence entirely and relied instead on the bald assertion, unsupported by any evidence, that the private parking industry was flourishing. In its trial memorandum, for example, the City of Pittsburgh stated:

> "[T]hat, except for a few borderline operations, *all parking lot operators in the City of Pittsburgh, including the plaintiffs, are realizing a comfortable profit on their investments.* The industry is not only not threatened with extinction by the prospect of an additional 5% tax levy [to 20%], but it is a healthy business considering this period of economic regression." Trial Memorandum, City of Pittsburgh, p. 3 (Emphasis added)

The City's position is completely negated by respondents' Exhibit 1 (Pl. Ex. 1, R. 507a-616a) and the City failed to offer any evidence in support of its contentions. Respondents, who are the major parking operators in Pittsburgh, are either losing money or showing no profit at all on their huge investments. As the court below found, contrary to state legislative policy, by its excessive 20% gross receipts tax and privileged public competition, Pittsburgh has in effect condemned respondents' property by rendering it impossible for them to make any economic return. As Justice Roberts emphasized:

"Not only is the Parking Authority able to charge lower rates than private operators, but with the enactment of the 20 percent gross receipts tax the taxing body now appropriates for itself practically all of the earnings of the private parking lot operators. By taking 20 percent of gross revenues 'off the top' the City effectively confiscates what were formerly the earnings of the parking lot owners. This confiscation is practically as complete as if the City had condemned without compensation the private lots to erect public facilities." (A. 23a)

Since few businesses in the United States return anything approaching 20% profits on gross receipts, it is hardly surprising that the 20% gross receipts tax has made it impossible for the parking industry in Pittsburgh to survive economically.

The entire trial record is also replete with uncontradicted evidence that the 20% tax could not be passed on to customers, as both the seven judge Commonwealth Court and the Supreme Court of Pennylvania found. For example, Peter Smith, Manager of the Meyers Brothers Chatham Center Garage, described the disastrous results of raising customers' parking rates on two prior occasions. In February 1969, the tax rate rose from 10 to 15%. In an attempt to pass on this increase, Meyers Brothers' rates were raised as follows:

24 hour rate from $1.75 to $2.00
8-12 hour rate from $1.25 to $1.50.

Even this relatively minor increase in rates caused a decline in the number of cars using the parking facility (R. 250a), and eventually necessitated cutbacks in the cashier's and attendants' staff (R. 251a-252a).

Again in Ooctober 1969, Meyers Brothers raised its rates to $2.25 for a 24 hour maximum and $1.75 for 8 to

12 hour parking. In this instance, business dropped off so sharply that four to five hundred parking spaces were left empty each day. Meyers Brothers was forced to lay off more personnel and to close off an entire floor of the garage (R. 252a-253a). Mr. Smith testified that when the tax rate was increased from 15 to 20%, another increase in parking rates would have resulted in Meyers having "no business whatsoever" (R. 254a). In fact, Meyers Brothers was compelled to institute a lower "early bird" rate in order to draw back some of its former customers (R. 254a).

Respondents' to pass on the tax was further demonstrated by the privileged competitive position of the Pittsburgh Public Parking Authority. Contrary to petitioner's assertion (Pp. 28-29), the record repeatedly substantiates the findings of the Supreme Court of Pennsylvania that the Parking Authority's rates are pegged far below those of the private operators. For example, the all-day (10-hour) rate for seven private operations—the Stanwix Garage, the four Grant-Smithfield lots, the Oliver Plaza Garage and the Oliver Plaza lot, among others—was $3.00 in 1970 (R. 618a, 578a), while the rate for the same interval at three competing Public Parking Authority garages at Bigelow Boulevard, Third Avenue and Ninth Street, was only $2.00 (R. 554a).

The most thorough compilation of Public Parking Authority and private rates is contained in the June, 1970 report by national parking experts Wilber Smith & Associates, who were retained to make the study by the Public Parking Authority of Pittsburgh itself (Pl. Ex. 11, R. 639a). The report is reprinted in full at pages 639 through 711 of the record. Table 3, reproduced at page 659 of the record, clearly demonstrates the disparities between the rate charged by the Public Parking Authority and private operators:

"TABLE 3

AVERAGE PARKING RATES

Interval	*Public Lots*[1]	*Public Garages*[2]	*Parking Authority Garages*[3]
1—Hour	$0.63	$0.70	$0.35
2—Hours	0.97	0.92	0.51
3—Hours	1.25	1.15	0.83
All-Day	1.97	2.11	1.73

(1) 30 public lots.
(2) Eight public garages.
(3) Eight Parking Authority garages."

The table establishes the fact that the short-term parking rates of the Parking Authority garages, which Donald M. McNeil, the leading parking expert in the City of Pittsburgh, testified is the critical factor for a "successful financial program" (R. 352a), are an average of one-half the private operators' rates, and that for any interval the Public Parking Authority substantially undercuts the dates of its private competitors.[13]

[13] Petitioner's contention (P. 31) that it introduced evidence that the tax could be passed on, based on the City's experience at its own wharf facility, is baseless. The City raised its all-day parking rate on its own small wharf lot from 75 cents to $1.50, after the City Treasurer concluded "this was too big of a bargain". (R. 427a) The City relies on the fact that there was little decrease in the number of customers using the City lot after the rate increase. This is hardly surprising, however, since the City's lot, even at its increased rate of $1.50 a day, was still a $1.00 cheaper than the rates charged in respondents' locations as well as those charged by its own Public Parking Authority. (R. 439a-440a) Accordingly, the City's raising its absurdly low parking rate to a level still far below the rate charged by any other parking facility in Pittsburgh is meaningless.

Donald McNeil testified, as an expert witness, that his studies have indicated that parking operators had reached a "point of no return" by raising their rates to a level where further rate increases would discourage shoppers from coming to downtown Pittsburgh at all. (R. 303a)

The uncontradicted record supports the conclusion of the Supreme Court of Pennsylvania that in the special competitive circumstances presented here, the City's prohibitive 20% gross receipts tax was arbitrary and unreasonable when combined with devastating public competition completely contrary to the intent of the State Legislature authorizing public entry into the parking industry. These factual findings are fully supported by the record and should not be reviewed by this Court.

Conclusion

For the foregoing reasons, it is respectfully requested that this Court deny the petition of the City of Pittsburgh for the issuance of a writ of certiorari to review the decree of the Supreme Court of Pennsylvania.

Respectfully submitted,

LEONARD BOREMAN,
RICHARD H. MARTIN,
BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG,

Attorneys for Respondents.

LEONARD M. MARKS,
GOLD, FARRELL & MARKS,
Special Counsel for Respondent,
Meyers Bros. Parking-Central
Corporation.

TABLE OF CONTENTS

	Page
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provision and Ordinance Involved	3
Questions Involved	4
Statement of the Case	5
Summary of Argument	10
Argument:	
I. The due process clause of the Fourteenth Amendment is not a limitation upon a revenue tax	13
A. The due process clause does not limit the discretionary power of a legislative body to select the rate of a revenue tax even though an industry may be harmed thereby	13
B. The decision below violates the separation of powers doctrine, with dire consequences for judicial caseloads	19
C. The rule that the due process clause does not limit a revenue tax is not changed where government competes with the private sector	24
D. Requiring government either to forego levying taxes or to forego providing services in the myriad areas where government and the private sector compete will be disastrous	32

II. Assuming arguendo that a high tax rate combined with competition from the taxing body could in a proper case be considered confiscatory, plaintiffs have not proven confiscation here 35

A. Lack of Proof re unprofitability 37

B. Lack of Proof re confiscation 39

1. No showing that the industry is being forced out of business 40

2. No showing that the tax cannot be passed on 41

Conclusion 48

TABLE OF CITATIONS

CASES:

Alaska Fish Co. v. Smith, 255 U.S. 44 (1921) 16, 17, 24

Atchison R. Co. v. Pub. Util. Comm'n, 346 U.S. 346 (1953) 25

Atkin v. Kansas, 191 U.S. 207 (1903) 36

Bank of Commerce v. New York City, 67 U.S. (2 Black) 620 (1862) 23

Bates v. Little Rock, 361 U.S. 516 (1960) 22

Bode v. Barrett, 344 U.S. 583 (1953) 24

Bowman v. Kansas City, 361 Mo. 14, 233 S.W. 2d 26 (1950) 30

Brushaber v. Union Pac. R. R., 240 U.S. 1 (1916) 24

Clark v. City of Cincinnati, 99 Ohio App. 152, 131 N.E. 2d 599 (1954), aff'd 163 Ohio St. 532, 127 N.E. 2d 363 (1955) 19

Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) 36

Dean v. Gadsden Times Publishing Corp., 412 U.S. 543 (1973) 25

Fiske v. Kansas, 274 U.S. 380 (1927) 35

Flast v. Cohen, 392 U.S. 83 (1968) 18

Flemming v. Nestor, 363 U.S. 603 (1960) 36

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 36

Fox v. Standard Oil Co., 294 U.S. 87 (1935) 23

Frick v. Pennsylvania, 268 U.S. 473 (1925) 16

Gate City Garage v. City of Jacksonville, 66 So. 2d 653 (Fla. 1953) 30

Griswold v. Connecticut, 381 U.S. 479 (1965) .. 24

Harvester Co. v. Dept. of Taxation, 322 U.S. 435 (1944) 17

Hasegawa v. Maui Pineapple Co., 52 Hawaii 327, 475 P. 2d 679 (1970) 25

Heiner v. Donnan, 285 U.S. 312 (1932) 16

Jayne v. City of Detroit, 348 U.S. 802 (1954) .. 29

John McShain, Inc. v. District of Columbia, 205 F. 2d 882 (D.C. Cir. 1953) 41

Knoxville v. Water Co., 212 U.S. 1 (1909) 39, 47

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 24

Macallen Co. v. Massachusetts, 279 U.S. 620 (1929) 17

Magnano Co. v. Hamilton, 292 U.S. 40 (1934) 13, 14, 15, 16, 17, 19, 24, 25, 26

McCray v. United States, 195 U.S. 27 (1904) ...23, 24

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 10, 17, 20, 22, 36

McGillick v. Pittsburgh, 415 Pa. 581, 203 A. 2d 480 (1964) 18

Michigan Central Railroad v. Powers, 201 U.S. 245 (1906) 23

Minersville District v. Gobitis, 310 U.S. 586 (1940) 30

Nat. Bellas Hess v. Dept. of Revenue, 386 U.S. 753 (1967) 15

New York Rapid Transit Corp. v. New York City, 303 U.S. 573 (1938) 41

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 35

Nichols v. Coolidge, 274 U.S. 531 (1927) 16

Nicol v. Ames, 173 U.S. 509 (1899) 36

North Coast Transportation Co. v. United States, 323 U.S. 668 (1944) 30

Ohio ex rel. Eaton v. Price, 360 U.S. 246 (1959) 30

Philadelphia v. Eglin's Garages, Inc., 342 Pa. 142, 19 A. 2d 845 (1941) 18

Philadelphia v. Samuels, 338 Pa. 321, 12 A. 2d 79 (1940) 18

Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830) 23

Public Parking Authority of Pittsburgh v. City of Pittsburgh, No. 687 July Term 1972, aff'd No. 97 C.D. 1973 42

Puget Sound Co. v. Seattle, 291 U.S. 619 (1934) 27, 29, 31, 42

Railroad Company v. Peniston, 85 U.S. (18 Wall.) 5 (1873) 23

Rapid Transit Corp. v. New York, 303 U.S. 573 (1938) 28, 29

Shapiro v. City of New York, 325 N.Y.S. 2d 787, 67 Misc. 2d 1021 (1971) 18, 19

Simon Appeal, 408 Pa. 464, 184 A. 2d 695 (1962) 9

Smith v. Allwright, 321 U.S. 649 (1944) 32

Spencer v. Merchant, 125 U.S. 345 (1888) 23

Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935) 23, 24

U. S. v. Central Eureka Mining Co., 357 U.S. 155 (1958) 25

United States v. Sanchez, 340 U.S. 42 (1950) 19

Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869) 22, 25, 26

Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449 (1829) 23

Whitemarsh Twp. Auth. v. Elwart, 413 Pa. 329, 196 A. 2d 843 (1964) 9

MISCELLANEOUS:

Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C. §1257(3) 2

Business Week, August 4, 1973, p. 21 34

Business Week, April 14, 1973, p. 27 34

City of Pittsburgh Ordinance No. 704 of 1969 3, 5, 6, 41

Note: Supreme Court Per Curiam Practice: A Critique, 69 Harv. L. Rev. 707 (1956) 30

Note: The Insubstantial Federal Question, 62 Harv. L. Rev. 488 (1949) 30

Parking Authority Law of June 5, 1947, P. L. 458, 53 P.S. Sec. 341 et seq. 5, 6, 9

Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964) 25

The Federalist No. XXI, Bourne Edition (1914), Vol. I, p. 140 21

The Fourteenth Amendment to the Constitution of the United States 3, 13

U. S. News and World Report, Vol. 72, March 13, 1973, p. 74 34

U. S. News and World Report, Vol. 74, January 8, 1973, p. 58 34

U. S. News and World Report, Vol. 74, January 29, 1973, p. 53 34

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, dated July 2, 1973, appears at page 1a of the Appendix to the Petition for Certiorari[1] and is reported at 453 Pa. 245, 307 A. 2d 851.

The opinion of the Commonwealth Court of Pennsylvania, dated October 10, 1972, upon rehearing, appears at P. 51a and is reported at 6 Commonwealth Ct. 453, 295 A. 2d 349.

The first opinion of the Commonwealth Court of Pennsylvania, dated June 8, 1972, appears at P. 55a and is reported at 6 Commonwealth Ct. 433, 291 A. 2d 556.

The opinion and final decree of the court en banc of the Court of Common Pleas of Allegheny County, dated July 14, 1971, appear at P. 78a and 83a and are unreported.

The opinion and decree nisi of the Court of Common Pleas of Allegheny County, dated March 19, 1971, appear at P. 84a and 102a and are reported at 119 P.L.J. 327.

---

[1]References designated by "A." are to the pages of the Single Appendix filed herewith.

References designated by "P." are to the pages of the Appendix to the Petition for Certiorari filed with this Honorable Court October 1, 1973.

STATEMENT OF JURISDICTION

Petitioner seeks review of the order and opinion of the Supreme Court of Pennsylvania dated July 2, 1973 (P. 1a). Rehearing was denied by the Supreme Court of Pennsylvania by order dated August 7, 1973 (P. 50a). The jurisdiction of the Supreme Court of the United States is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

The fourteenth amendment to the Constitution of the United States provides, in relevant part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."

City of Pittsburgh Ordinance No. 704 of 1969 is set forth in full at pages 103a through 110a of the Appendix to the Petition for Certiorari.

QUESTIONS INVOLVED

I. Under this Court's interpretation of the due process clause and the separation of powers doctrine, is the judiciary prohibited from imposing a limitation upon the legislatively-set rate of a revenue tax even where the taxpayer competes with a governmental agency exempt from certain taxes?

II. Have respondents failed to prove confiscation where they have not shown (1) unprofitability; (2) that they are forced out of business, and (3) that the tax cannot be passed on to customers?

(Petitioner requests that these questions be answered in the affirmative.)

STATEMENT OF THE CASE

On February 20, 1970, twelve operators (respondents herein) of off-street parking facilities located in the central city area of the City of Pittsburgh filed an action to enjoin enforcement of City of Pittsburgh Ordinance No. 704 of 1969 (P. 103a), hereafter the "Parking Tax Ordinance".

The Parking Tax Ordinance was enacted *"to provide for the general revenue"* (P. 103a) by imposing a tax on the privilege of engaging in non-residential parking transactions for a consideration (emphasis added). It established the rate at 20% of the gross receipts derived from engaging in parking transactions, superseding and replacing a 1968 ordinance which had levied the identical tax at the rate of 15%. The 15% tax enacted in 1968 had, in turn, superseded and replaced the initial Parking Tax Ordinance enacted in 1962 at the rate of 10% (P. 2a).

At the time of suit, respondents owned and operated approximately 17,000 of the 18,000 private spaces in the downtown area of the City, thus controlling approximately 71% of the 24,300 spaces there (A. 281a; P. 2a; 53a; 62a). Other private operators, not respondents in this case, controlled about 1000 spaces (4%). The balance of about 6100 spaces (25%) was owned by the Parking Authority of the City of Pittsburgh, an independent agency of the Commonwealth of Pennsylvania created pursuant to the Parking Au-

thority Law of June 5, 1947, P. L. 458, 53 P.S. §341 et seq. (A. 280a; P. 62a; Finding No. 8, P. 87a).

The 71% of the industry represented by respondents paid $1.3 million in parking tax out of the total industry payments of $2.1 million at the 15% rate in 1969, and respondents paid $1.6 million at the 20% rate in 1970 (P. 62a; A. 597a). The tax has thus raised approximately $2.5 million dollars per year since 1970 (P. 43a; A. 597a).

This suit sought to enjoin the enforcement of the Parking Tax Ordinance on the grounds (1) that it created a discriminatory and arbitrary classification in violation of the equal protection and uniformity clauses of the federal and state constitutions; and (2) that it constituted a confiscatory taking in violation of the due process clause of the fourteenth amendment (A. 3a-7a; P. 85a). After an Answer was filed by the City (P. 12a), the matter was tried on Sept. 15-17, 1970. On March 19, 1971, the Court of Common Pleas of Allegheny County filed an adjudication and decree nisi, together with findings of fact and conclusions of law (P. 84a-102a). The court held that the tax violated no constitutional provisions.[2]

Although the Pennsylvania Supreme Court, as noted by the dissents, paid scant heed to the chan-

---

[2] Both the Commonwealth Court of Pennsylvana and the Supreme Court of Pennsylvania unanimously agreed with the Court of Common Pleas and petitioner City that the parking tax was not violative of the equal protection clause or the uniformity clause. The argument before this Honorable Court, therefore, will deal only with those portions of the courts' opinions dealing with the due process clause.

cellor's findings (P. 42a), which have the force and effect of a jury verdict (P. 28a), those findings, most of which were not disputed by the Supreme Court (P. 15a-16a, footnote 7), are significant.

The chancellor, noting that respondents were all still in business, found that the parking tax was not forcing the operators out of business (P. 98a). The chancellor pointed out that respondents' gross receipts, *after* the parking tax, increased in 1969 despite the increase in the parking tax from 10% to 15%, and remained virtually stable for the first six months of 1970 after the increase from 15% to 20% (A. 414a; P. 99a). Moreover, he found that any decreased return resulted from increased labor costs and other operating expenses as well as the parking tax (P. 99a).

The chancellor's finding that the parking tax was not forcing respondents out of business was buttressed by his findings concerning their failure to pass the tax on to their customers. Among other things, the chancellor found:

> "19. The demand for parking spaces in the City of Pittsburgh far exceeds the supply.
>
> 20. None of the plaintiffs have increased their rates since February of 1970.
>
> 21. Plaintiffs have not attempted to pass on the increased tax to the parking lot patrons.
>
> * * * * * *
>
> 27. The City of Pittsburgh experienced only a temporary reduction in the number of cars parked at its facility on the Wharf after it doubled

its price for parking." (A. 417a; P. 16a; 42a; 89a-90a).

Furthermore, one of the respondents, Sheppard, testified on cross-examination as follows:

> "Q. Sir, has it been your experience in the past that when you increase the rates you also receive an increase in your revenue?
>
> A. Yes, sir." (A. 187a).

The Appendix to the dissenting opinion of Justice Pomeroy (P. 49a) shows clearly that respondents themselves recognized that rates could be raised in order to maximize revenues.

Respondents' exceptions to the decree nisi of the chancellor were overruled by the court en banc in an opinion and final decree dated July 14, 1971 (P. 78a).

Respondents appealed to the Commonwealth Court of Pennsylvania, which issued an opinion on June 8, 1972 (P. 55a-77a) and again, adhering to the same division after reargument, on October 10, 1972 (P. 51a-54a). While suggesting that the tax rate was too high, the majority (4-3) acknowledged that courts cannot interfere with the legislative function of setting a tax rate when, as here, the ordinance is clearly an exercise of the taxing power (P. 64a).

The Supreme Court of Pennsylvania then allowed an appeal and, by a 4-3 majority, reversed the courts below. Justice Roberts, for the majority,[3] held that

---

[3] Justice Roberts' opinion was joined in by only two other justices. Justice O'Brien concurred in the result (P. 27a).

the parking tax violated the due process clause of the fourteenth amendment because of its high rate, combined with the fact that "the taxing body was in direct competition . . . with private enterprise'"[4] (P. 21a).

Three justices of the Pennsylvania Supreme Court dissented. Justice Eagen, in an opinion concurred in by Chief Justice Jones and Justice Pomeroy, concentrated upon the incorrect legal underpinnings of the majority opinion, pointing out that the case law in this Court has long interpreted the due process clause to allow the legislative body to set a tax rate without interference from the judiciary (P. 27a). Justice Pomeroy, in a separate dissenting opinion, dealt largely with respondents' failure to show sufficient facts to entitle them to relief (P. 38a-49a).

The City's petition for reargument was denied per curiam August 7, 1973, Justice Eagen dissenting (P. 50a).

---

[4] Actually, §5 of the Parking Authority Law, 53 P.S. §345, provides, in relevant part, that a Parking Authority "shall in no way be deemed to be an instrumentality of the city or engaged in the performance of a municipal function." Moreover, the Pennsylvania courts had, prior to this case, consistently distinguished between an authority and its organizing municipality. *Whitemarsh Twp. Auth. v. Elwart*, 413 Pa. 329, 332, 196 A. 2d 843 (1964); *Simon Appeal*, 408 Pa. 464, 184 A. 2d 695 (1962).

SUMMARY OF ARGUMENT

The Supreme Court of Pennsylvania erred in holding that the City of Pittsburgh Parking Tax Ordinance violates the due process clause of the fourteenth amendment. This Court has held that a revenue tax may constitutionally be imposed at any rate that the legislative body deems proper, even if businesses may be harmed thereby.

Interference by a court with the legislatively-set rate of tax is a violation of the separation of powers doctrine. The power to tax has been placed by the people with their elected representatives. From *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), to the present, this Court has held that the security against an alleged abuse of the power of taxation must rest in the reality that a legislative body acts upon its constituents. The courts determine only whether the power to tax exists; the extent or rate of tax is a matter for the legislature. If courts were to interfere with the rates of tax set by legislative bodies, a floodtide of litigation would engulf the judicial system.

The fact that the taxing body may compete with the taxed industry does not warrant a different result. In several cases this Court has sustained taxes against due process challenges where the taxing body competes with the private sector. The Constitution does not protect private industry against the consequences of competition.

If the rule were otherwise and the decision below were correct, the ability of government to serve the public would be devastated. Government competes with the private sector in a multitude of areas, ranging from education to transit to recreational services. If government were required to forfeit its right to tax the private sector wherever it competes with private industry, public bodies would be unable to provide essential services. In particular, the decision below gravely threatens the power of government to tax aspects of the automobile industry in order to promote the use of mass transit and help solve the energy and pollution problems.

Even if the legal theory of the court below were correct, respondents have not proven confiscation of their property. They have not even shown unprofitability. Their major exhibit was prepared by an unqualified person; was unrepresentative of the parking industry as a whole; and most importantly, rested not on actual experience, but on projection.

Assuming respondents had proven unprofitability, that would not show confiscation. Respondents were not being forced out of business, and in fact their gross receipts, after the tax, were remaining steady.

Nor did respondents prove that the tax could not be passed on to the consumer. The alleged competition from the Parking Authority is an irrelevant factor even if Authority rates were lower than private rates. Because Authority garages are filled to capacity and an unsatisfied demand for parking spaces exists in downtown Pittsburgh, private operators are not af-

fected by Authority rates. Actual experience has shown that general rate increases by private operators in the past have always resulted in an increase in gross receipts.

Thus, neither the law nor the facts of this case support the holding that the parking tax violates the due process clause. The order of the court below should be reversed.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT A LIMITATION UPON A REVENUE TAX

A. The Due Process Clause Does Not Limit the Discretionary Power of a Legislative Body To Select the Rate of a Revenue Tax Even Though an Industry May Be Harmed Thereby

The holding of the majority of the Supreme Court, invalidating the parking tax as violative of the due process clause of the fourteenth amendment, conflicts with the consistent holdings of this Court that the due process clause is not an impediment to a legislature's power to impose any rate of taxation that the legislature, in its wisdom, sees fit to levy for general revenue purposes.

It would be difficult to improve upon the formulation unanimously set forth by this Court when it sustained the 15 cents per pound excise tax on butter substitutes in *Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934). That case, upon which both the majority in the Commonwealth Court (P. 65a) and the dissenters in the Supreme Court (P. 30a) relied heavily, held that the due process clause is a limitation upon a tax-

ing statute only when the statute is not really a tax at all:

> "Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. Brushaber v. Union Pac. R. Co., 240 U.S. 1, 24. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. French v. Barber Asphalt Paving Co., 181 U.S. 324, 329; Heiner v. Donnan, 285 U.S. 312, 326."

In *Magnano,* the appellant company had ceased to make intrastate sales, claiming that the tax was prohibitive. Yet this Court, conceding that to be the case, nonetheless held that the tax did not violate the due process clause, citing, at pp. 44-45, several earlier cases to the same effect:

> *"Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses* (Loan Association v. Topeka, 20 Wall. 655, 663-664; McCray v. United States, supra, 56-58; and authorities cited; Alaska Fish Co. v. Smith, 255 U.S. 44, 48, 49; Child Labor Tax Case, supra, 259 U.S. 38, 40-43), unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power

denied by the Federal Constitution to the state. The present case does not furnish such a demonstration.

"The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the validity of the 10 percent tax imposed upon the notes of state banks involved in Veazie Bank v. Fenno, 8 Wall. 533, 548. This Court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments." (emphasis added).

In dictum in *Magnano* this Court recognized that "in rare and special instances" a purported taxing statute could involve not an exertion of the taxing power, but the exertion of a different and forbidden power such as the confiscation of property. The majority in the court below seized on this language (P. 19a; 21a) in *Magnano* while ignoring the factual situation involved there, the acknowledged destruction of the business, which was held not to be a confiscation of property prohibited by the due process clause.

The "rare and special instances" to which the *Magnano* Court referred are not cases in which a rate is attacked as being too high, but cases in which the subject of the tax is beyond the jurisdiction of the taxing body.[5] No case has been found in which this

[5] For instance, in *Nat. Bellas Hess v. Dept. of Revenue*, 386 U.S. 753, 756 (1967), this Court held that in determining

Court has invalidated a tax under the due process clause because of its rate.

The question of whether a taxing measure is not really a taxing measure but confiscation cannot be answered by looking to the rate. If that were the test, *Magnano* would have been decided differently. A different result would also have been reached in *Alaska Fish Co. v. Smith*, 255 U.S. 44, 48 (1921), where an Alaska statute levying a heavy tax upon persons manufacturing fish oil was upheld against the contention that it would confiscate the plaintiffs' business. Justice Holmes stated:

> "Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk."

Whereas the Pennsylvania Supreme Court has struck down this tax as "excessive and unreasonable"

---

whether a state tax meets the requirements of due process, the controlling question is whether the state has given anything for which it can ask a return. If the situs of the taxed property is wholly outside the state, then it *would* be violative of due process to permit the tax. Likewise, this jurisdictional argument—that the situs of the assets was outside Pennsylvania—was the basis for this Court's striking down the estate tax in *Frick v. Pennsylvania*, 268 U.S. 473 (1925).

Those two cases considered lack of jurisdiction geographically. The cases referred to in footnote 1 in *Magnano* as the rare and special instances involved lack of jurisdiction temporally. *Nichols v. Coolidge*, 274 U.S. 531 (1927) struck down an attempt to tax a transfer completed prior to the enactment of the statute. In *Heiner v. Donnan*, 285 U.S. 312 (1932), the statute purported to treat as conclusively within a decedent's estate a gift that had been completed prior to his death.

(P. 20a), this Court has held that the fourteenth amendment does not prohibit a tax merely because it is unwise, unfair, or burdensome. *Harvester Co. v. Dept. of Taxation,* 322 U.S. 435, 444 (1944).

If the courts had the power to limit the rate of a tax, it would have been unnecessary to hold that state taxes on national bank notes, *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), or on United States bonds, *Macallen Co. v. Massachusetts,* 279 U.S. 620 (1929), were unconstitutional because the power to tax involves the power to destroy. No power of destruction would exist because the courts could limit the rate when that point of destruction approached.

The lesson of *Magnano, supra,* and *Alaska Fish Co., supra,* is that a high rate cannot be a basis for declaring that a tax is not really a tax but a confiscation. This teaching the majority in the court below ignores. As stated by Justice Eagen in dissent (P. 31a):

> "The majority opinion does not indicate this taxing statute qua taxing statute is invalid, or the taxing measure 'does not involve an exertion of the taxing power', which are the guidelines established by the Supreme Court of the United States. Rather, the majority opinion focuses on the tax rate and its enforcement, and I view this as error. It is one thing to say a taxing statute is arbitrary and beyond the reach of the taxing power of the legislative branch, a point I do not contest, but it is quite another to say the exercise of the lawful taxing power is a violation of due process of law because of a high tax rate."

"The Due Process Clause . . . does not protect taxpayers against increases in tax liability." *Flast v. Cohen,* 392 U.S. 83, 105 (1968).

There is not a scintilla of evidence in the record of this case that the City wants to accomplish anything more in raising its parking tax 5% than to obtain additional revenue. The tax has been successful in raising revenue. Respondents' Exhibit 3 in this case shows that the 15% tax, enacted in 1968 for the year 1969 and never challenged in the courts, brought in over two million dollars in revenue for that one year (A. 597a; 81a). The 1970 tax, which was paid until superseded by the 1973 Ordinance, is exactly the same tax as the 1969 tax except for a 5% increase in rate (P. 8a) required to augment the City's revenue to cover costs of inflation.

This tax did not, like Athena, spring full-grown from the head of Zeus. Rather, it is built upon the foundation of the earlier taxes, identical except as to rate since the year 1962 (P. 8a; 56a). The 10% tax had been sustained against constitutional challenge by the Supreme Court of Pennsylvania in *McGillick v. Pittsburgh,* 415 Pa. 581, 203 A. 2d 480 (1964), while Philadelphia's similar 10% gross receipts parking tax had been sustained, specifically against charges that it was confiscatory, in *Philadelphia v. Eglin's Garages, Inc.,* 342 Pa. 142, 19 A. 2d 845 (1941) and *Philadelphia v. Samuels,* 338 Pa. 321, 12 A. 2d 79 (1940).

The fact that the tax raises revenue "obliterates any question of lack of due process." *Shapiro v. City of New York,* 325 N.Y.S. 2d 787, 794, 67 Misc. 2d 1021

(1971), citing *Magnano* in sustaining a tax on professionals' earnings against a due process challenge.

Similarly, in *Clark v. City of Cincinnati*, 99 Ohio App. 152, 131 N.E. 2d 599, 603 (1954), *aff'd* 163 Ohio St. 532, 127 N.E. 2d 363 (1955), the court held that the due process clause was irrelevant to the constitutionality of an earned income and net profits tax:

> "A tax law is per se due process. The ordinance is a revenue measure solely. Its only object was to raise revenue. That the council had power to tax to raise revenue to pay the operating expense of the municipal government cannot be disputed."

Even if Pittsburgh had had another purpose in addition to its revenue purpose, the fact that the tax raises revenue immunizes it from attack. This is so even if the revenue raised is negligible (not the case here) or the revenue purpose is secondary. *United States v. Sanchez*, 340 U.S. 42, 44 (1950).

B. The Decision Below Violates the Separation of Powers Doctrine, With Dire Consequences for Judicial Caseloads

---

The separation of powers doctrine is at the heart of this Court's insistence that the due process clause does not limit a revenue tax. If allowed to stand, the holding of the court below, in addition to depriving one of our hard-pressed urban areas of millions of

dollars of needed revenue, will also create a devastating crisis in the courts. At a time when this Court and most courts throughout the country are inundated with work, the court below would abjure the wisdom of Chief Justice Marshall and open up the floodgates to a possible tidal wave of litigation attacking taxes as being too high.

In *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 428 (1819), Chief Justice Marshall, for the Court, stated:

> "[T]he power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.
>
> "The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited. they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse."

Moreover, the framers of the Constitution recognized that taxes that are too high carry with them the

seeds of their own destruction. In *The Federalist No. XXI,* Bourne Edition (1914), Vol. I, p. 140, Alexander Hamilton stated:

> "It is a signal advantage of taxes on articles of consumption, that they contain in their own nature a security against excess. They prescribe their own limit; which cannot be exceeded without defeating the end proposed,—that is, an extension of the revenue. When applied to this object, the saying is as just as it is witty, that 'in political arithmetic, two and two do not always make four'. If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds. This forms a complete barrier against any material oppression of the citizens by taxes of this class, and is itself a natural limitation of the power of imposing them."

Thus both the influence of constituents on legislators and a Tocquevillian enlightened self-interest on the part of those legislators combine to limit the rate of taxes in the legislative branch of government.

Justice Eagen in his dissent (P. 34a) properly condemned the majority's intrusion on legislative power:

> "The most troublesome aspect of the rationale adopted by the majority opinion is that by considering the tax rate, it is taking on a non-judicial function, and in effect sitting as a legislative body. This approach strikes at the heart of the principle

of separation of powers and is, therefore, contrary to constitutional doctrine. The sum and substance of the majority's opinion is: the tax rate is too high for the garage owners to make a substantial profit; hence, the tax is unjust and must be struck down. However, the wisdom of a tax rate is strictly for the legislative branch, and for this Court to strike a tax down because of a high rate is to usurp a legislative power. Moreover, by so doing this Court has to go beyond its own power and exercise the usurped power in an arbitrary fashion by substituting its concept of public policy, or wisdom, for that of the Legislature."

If this Court were to place its imprimatur upon judicial interference with the rates of tax, it is difficult to see an end to the litigation that would be engendered. Practically all Americans agree that taxes are higher than they would like them to be. If a citizen's visceral reaction can be translated into lawsuits requiring courts to determine whether taxes are too high, the courts will have time for little else.

As Justice Stewart noted for this Court in *Bates v. Little Rock,* 361 U.S. 516, 524 (1960) (dictum), "No power is more basic to the ultimate purpose and function of government than is the power to tax." Since *McCulloch v. Maryland, supra,* this Court has been steadfast in preventing judicial encroachment upon that power. In *Veazie Bank v. Fenno,* 75 U.S. (8 Wall.) 533, 548 (1869), this Court stated:

"The power to tax may be exercised oppressively upon persons, but the responsibility of the

legislature is not to the courts, but to the people by whom its members are elected."

Likewise, in *Michigan Central Railroad v. Powers,* 201 U.S. 245, 296 (1906), quoting Chief Justice Marshall in *Providence Bank v. Billings,* 29 U.S. (4 Pet.) 514, 563 (1830), this Court held:

> "This vital power [of taxation] may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally."

See also, Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449, 465 (1829) (Marshall, C. J.); *Bank of Commerce v. New York City,* 67 U.S. (2 Black) 620 (1862); *Railroad Company v. Peniston,* 85 U.S. (18 Wall.) 5 (1873); *Spencer v. Merchant,* 125 U.S. 345 (1888); *McCray v. United States,* 195 U.S. 27 (1904); and *Fox v. Standard Oil Co.,* 294 U.S. 87, 99 (1935), in the last of which Justice Cardozo noted:

> "When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers."

This Court stated in *Stewart Dry Goods Co. v. Lewis,* 294 U.S. 550, 563 (1935):

"Once the lawfulness of the method of levying the tax is affirmed, the judicial function ceases."

It is respectfully submitted that the court below has erred in extending the judicial function far beyond the limits set by this Court. In so doing, it makes the courts into the "super-legislatures" which this Court has often held they should not be. *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965). Petitioner urges this Court to restore the proper balance between the judicial and the legislative branches of government.

C. The Rule That the Due Process Clause Does Not Limit a Revenue Tax Is Not Changed Where Government Competes With the Private Sector

---

The majority purports to distinguish *Magnano, supra; Alaska Fish, supra; McCray v. United States,* 195 U.S. 27, 56 (1904); *Brushaber v. Union Pac. R.R.,* 240 U.S. 1, 34 (1916); and similar cases,[6] holding that the due process clause does not limit the rate of a revenue tax, on the basis that here an added element exists, making it a case of first impression—the element of competition from the taxing body.[7]

---

[6] *Magnano* has most recently been cited with approval by this Court in *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973). *See also, Bode v. Barrett,* 344 U.S. 583, 585 (1953).

[7] As noted in footnote 4, *supra,* the competition does not come from the taxing body. For the purpose of this first argument, however, it will be assumed *arguendo* that the characterization of the majority of the Pennsylvania Supreme Court was correct.

Justice Roberts cites no authority for his theory, save a law review article, Sax, *Takings and the Police Power,* 74 Yale L.J. 36 (1964), and one Hawaii case, *Hasegawa v. Maui Pineapple Co.,* 52 Hawaii 327, 475 P. 2d 679 (1970). The theory enunciated in the former, by title and by content, deals not with taxation but with the police power, and is, by the author's own admission, inconsistent with numerous decisions of this Court. *See,* e.g., *U. S. v. Central Eureka Mining Co.,* 357 U.S. 155 (1958), where this Court held that a government order shutting down private gold mines so that workers would be available for service in copper mines to produce ore necessary for the Government's war effort was not a compensable taking. *See also,* the grade crossing cases, e.g., *Atchison R. Co. v. Pub. Util. Comm'n,* 346 U.S. 346 (1953).

As pointed out in Justice Pomeroy's dissent at footnote 3 (P. 41a), the *Hasegawa* case retains no semblance of validity after the decision of this Court in *Dean v. Gadsden Times Publishing Corp.,* 412 U.S. 543 (1973).

Justice Roberts is simply incorrect in his assertion that the competition aspect makes this a case of first impression. The fact is that on several occasions this Court has been faced with almost identical situations, where the taxing body was competing with the taxed industry.[8] This issue was first decided by this Court over a century ago in *Veazie Bank v. Fenno,* 75

[8] The attempt of the majority below to carve out an exception to the *Magnano* doctrine is not only inconsistent with the holdings of this Court, but also, it is submitted, evidences an unfortunate view of government as an entity apart from the people. The tax

U.S. (8 Wall.) 533 (1869). There a 10% tax was imposed by Congress on the notes of state banks. This was in addition to other taxes aggregating 6% on state banks, for a total of a 16% tax. 75 U.S. at 549, 554 (dissenting opinion). As noted in the dissenting opinion, 75 U.S. 549, 556, the purpose of the tax on state bank notes was to foster the national banks at the expense of the state banks.

Nonetheless, despite the competition aspect, the Court sustained the tax against a confiscation argument such as is made here, holding, 75 U.S. at 548:

> "It is insisted, however, that the tax in the case before us is excessive and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the Bank, and is, therefore, beyond the constitutional power of Congress.
>
> "The first answer to this is that the Judicial cannot prescribe to the Legislative Departments

---

in *Magnano* aided the butter industry at the expense of the margarine industry to the point of eliminating the latter. Yet neither the majority below nor Professor Sax would hold that confiscation occurred there because, rather than favoring the government operation over the private industry, the tax favored another private industry.

Yet it would seem to be exalting form over substance to distinguish the situation where the governmental body effects the will of the people through a tax favoring the butter industry from that where it accomplishes its goals by creating a governmental agency.

The majority below and Professor Sax rely on this artificial distinction because the full impact of their thesis is troublesome. Carried to its logical conclusion, the holding below would prevent any taxation whatsoever, for, by its very nature, taxation favors one segment of society over another.

of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the courts but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

A second case directly in point is *Puget Sound Co. v. Seattle,* 291 U.S. 619 (1934). There a power and light company alleged a taking of property without due process because the City imposed a gross receipts tax upon it while both the company and the City were "engaged and actively *compete*[*d*] in the business of furnishing electric light and power to consumers for hire." 291 U.S. at 621. (Emphasis added). This Court held that the due process clause does not prevent such competition. It pointed out that what the private company was actually seeking, as are respondents here, is insulation from competition, and the due process clause does not provide such protection. It noted:

> "The injury, which appellant fears may result, is the consequence of competition by the city, and not necessarily of the imposition of the tax. Even without the tax the possibility of injury would remain, for the city is not bound to conduct the business at a profit. The argument that some way must be found to interpret the due process clause so as to preclude the danger of such an injury fails to point the way. Legislation may

protect from the consequences of competition, but the Constitution does not. Helena Water Works Co. v. Helena, supra; Vicksburg v. Henson, 231 U.S. 250. The Fourteenth Amendment does not purport to protect property from every injurious or oppressive action by a state, Memphis Gas Co. v. Shelby County, 109 U.S. 398, 400; St. Louis v. United Railways Co., 210 U.S. 266, 276, nor can it relieve property of congenital defects, Madera Water Works v. Madera, supra, 456. It does not preclude competition, however drastic, between private enterprises or prevent unequal taxation of competitors who are different. Those were risks which appellant took when it entered the field. No articulate principle is suggested calling for the conclusion that the appellant is not subject to the same risks because the competing business is carried on by the state in the exercise of a power which has been constitutionally reserved to it from the beginning.

"Such was the decision in Madera Water Works v. Madera, supra, where this Court pointed out that, in the absence of any contract restriction the Fourteenth Amendment does not prevent a city from conducting a public water works in competition with private business or preclude taxation of the private business to help its rival to succeed." At pp. 625-26.

Another case in which a tax on private operators was upheld despite competition from the taxing body was *Rapid Transit Corp. v. New York,* 303 U.S. 573

(1938). There, a tax on the gross receipts of public utilities was sustained despite a challenge based, *inter alia,* upon allegations of unfairness in that the private transit operators could not compete with the city-owned transit lines.

In *Jayne v. City of Detroit,* 348 U.S. 802 (1954), this Court reached the same result in a case involving municipally-owned parking facilities. In that case, the private parking operators filed suit in the Wayne County Circuit Court alleging that Detroit's ordinances providing for construction of off-street parking garages violated, *inter alia,* the due process clause of the fourteenth amendment by creating "unlawful and unfair competition with appellants' parking businesses." (Statement as to Jurisdiction, pp. 5-6). This argument was rejected on its merits by the Supreme Court of Michigan which treated a prohibition action against the Circuit Court judges as a kind of demurrer (Statement as to Jurisdiction, Appendix "A", pp. 25-26). On appeal by the operators to this Court, Detroit relied on *Puget Sound, supra,* and other similar cases. This Court determined that the situation which the Pennsylvania Supreme Court held to deprive the instant respondents of due process of law did not even present a substantial federal question, and the appeal was dismissed for that reason.[9]

---

[9] The assertion to the contrary in the Brief for Respondents in Opposition to the Petition for Certiorari notwithstanding, *Jayne* was indeed decided on its merits by this Court. The dismissal for want of a substantial federal question is a decision on the merits, that the alleged federal question raised by the appellant has no merit.

Argument

In *Gate City Garage v. City of Jacksonville,* 66 So. 2d 653, 660 (Fla. 1953), the court stated:

> "There may be public hospitals, waterworks, electric light plants, and other enterprises acquired and operated primarily for the benefit of the public and there may also be private hospitals, waterworks, and electric light plants operated primarily for private profit and private gain. When the Legislature authorizes a particular undertaking, such as the parking system involved in this case, and it is found and determined that such system primarily serves a public and municipal purpose, it is not a valid objection that the municipality will be engaged in competition with private business. . . .
>
> "We find no provision of the State or Federal Constitutions which prohibits a municipal corporation to acquire, own and operate a system such as that involved in this case because it may be in competition with private individuals, firms and corporations."

See also, Bowman v. Kansas City, 361 Mo. 14, 233 S.W. 2d 26 (1950), also sustaining the right of the city to

---

For cases treating such dismissals as determinations on the merits, see *North Coast Transportation Co. v. United States,* 323 U.S. 668 (1944); *Minersville District v. Gobitis,* 310 U.S. 586, 592 (1940); and *Ohio ex rel. Eaton v. Price,* 360 U.S. 246, 247 (1959) (Brennan, J.) ("Votes . . . to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . ."). *See also,* Note, *Supreme Court Per Curiam Practice: A Critique,* 69 HARV. L. REV. 707, 709 (1956); and Note, *The Insubstantial Federal Question,* 62 HARV. L. REV. 488 (1949).

establish parking garages that compete with private industry.

Respondents have contended in their Brief in Opposition to the Petition for Certiorari that some of the cases cited by petitioner are distinguishable because the rate of the tax in *Puget* was lower than here, and because some of the cases do not involve taxes but merely competition by the government with private industry.

In the first place, the stated rate of tax is totally irrelevant divorced from other criteria. As Justice Eagen points out in his dissent (P. 34a), a much lower rate of tax can greatly affect a firm or an industry with a narrow profit margin.

More important, however, is that respondents have misread this Court's opinion in *Puget*. As indicated there, the private operator would be in the same relative situation if there were no tax at all, and the public operation were run at a loss and subsidized with public funds.

The majority below admits that a high rate per se cannot invalidate a tax. *Puget* holds clearly that competition from a public body does not warrant relief to a private operator. The tax is proper; competition is proper. The majority below holds that two rights make a wrong.

D. Requiring Government Either To Forego Levying Taxes or To Forego Providing Services in the Myriad Areas Where Government and the Private Sector Compete Will Be Disastrous

The decision below is not only inconsistent with the holdings of this Court, but it is also profoundly inconsistent with the structure of government as we know it. The decision below, if allowed to stand, threatens to destroy the ability of government to serve the public.

The consequence of the holding below is to deny public bodies the right to provide badly-needed services in areas where the private sector is involved, unless government forfeits its right to tax the private sector.

Respondents in their Brief in Opposition (page 19) disagree that dire results are possible, because they suggest that this case is *sui generis,* and must be limited to its allegedly peculiar facts. Petitioner submits that analogous factual situations exist throughout society. *See infra.* The court below has radically altered the law relating to the supplying of services by government. To limit that altered law to this particular case might benefit government, but it would hardly promote respect for the law, for the decision would be, in the words of Justice Owen Roberts, like "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright,* 321 U.S. 649, 669 (1944).

Can it be that in an area where government-supported public transit exists and necessarily competes with private bus, street railway, taxi, and railroad companies, as well as with private parking garages and lots, a governmental body may no longer levy the rate of tax its legislature finds necessary for it to discharge its obligations?

Likewise, where the government provides low-cost housing, must it compensate all landlords whose competitive position has declined? Although privately-owned airports seldom have the resources sufficient to construct runways large enough for jet airplanes, does the building of a government-operated airport prevent taxation of private airports? Must government forego taxation of private ferry operators at the rate it deems necessary when it builds a bridge? Is a state constitutionally forbidden to tax a private school because it operates a public school system? The list can be multiplied endlessly. Under the decision below, government will be required either to forego levying taxes or to forego providing services in such areas as: utility services, including electricity, water, sewage, and garbage disposal; recreational services such as municipal stadiums, parks, swimming pools, golf courses, ski slopes and cultural programs; and educational services and facilities of all types.

Furthermore, the decision below has grave implications with regard to the efforts of governmental agencies to cope with the twin crises of air pollution and fuel shortage. A plan for additional taxes upon the privilege of parking has been one of many possible

solutions proposed to help to solve these problems,[10] all of which solutions will undoubtedly redound to the detriment of parking operators.

Surely a consequence of an additional tax on parking or on gasoline, or some other means of restricting the amount of traffic coming into the metropolitan area, will be the diversion of the commuting population from the private parking operators to the public transit systems. If the instant tax is invalid, these projected taxes may be as well, and we may be condemned to choke on our automobile exhausts until our fuel supply is itself exhausted.

It is respectfully submitted that competition between government and the private sector permeates our society. It has existed, particularly in education, almost since the founding of the country. To require government to forego taxation of private persons at the rate its legislative body deems wise merely because it is in competition with the taxpayer will cripple government.

---

[10] *See, e.g.*, U. S. News and World Report, Vol. 74, January 8, 1973, p. 58.

U. S. News and World Report, Vol. 74, January 29, 1973, p. 53.

Business Week, April 14, 1973, page. 27.

Business Week, August 4, 1973, page 21.

U. S. News and World Report, Vol. 72, March 13, 1973, p. 74.

II. ASSUMING ARGUENDO THAT A HIGH TAX RATE COMBINED WITH COMPETITION FROM THE TAXING BODY COULD IN A PROPER CASE BE CONSIDERED CONFISCATORY, PLAINTIFFS HAVE NOT PROVEN CONFISCATION HERE

Petitioner believes that it has demonstrated fully that the legal predicates of the majority opinion below are incorrect, but even if Justice Roberts' legal views were accepted, respondents cannot prevail because they failed to develop the evidence necessary to show a violation of the due process clause.

In the instant case, the facts are intertwined with the constitutional question. This Court noted in *New York Times Co. v. Sullivan,* 376 U.S. 254, 285 (1964), that its duty is not limited to the elaboration of constitutional principles, but in proper cases it must also review the evidence to see that those constitutional principles have been constitutionally applied. In *Fiske v. Kansas,* 274 U.S. 380, 385-86 (1927), this Court stated:

> "[T]his Court will review the finding of fact by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

Such is the situation here.

In the process of applying the constitutional issues to the facts of the instant case, the presumption of

constitutionality that applies to all enactments should be borne in mind. *Flemming v. Nestor,* 363 U.S. 603, 617 (1960). The Court there referred to Chief Justice Marshall's famous language in *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 128 (1810), where the Court stated:

> "... it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

See also, Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 625 (1819) (Marshall, C. J.) (dictum).

In *Atkin v. Kansas,* 191 U.S. 207, 223 (1903), in sustaining a maximum hour law, this Court held that legislative enactments should be upheld unless they are "plainly and palpably, beyond all question" unconstitutional. This presumption in favor of constitutionality has been held especially applicable to a revenue measure, *Nicol v. Ames,* 173 U.S. 509 (1899), since the power to tax is so vital to government. *McCulloch v. Maryland, supra.*

With this standard in mind, respondents' proof fell far short of that necessary to sustain a holding of confiscation.

Respondents rest their case upon alleged proof of the unprofitability of their operations. It is submitted that they have not even proven unprofitability, but

even if they had, unprofitability by no means is synonymous with confiscation.

A. Lack of Proof Re Unprofitability

Respondents purport to have proven unprofitability for a six-month period and a projected unprofitability for six months more. Yet, as Justice Pomeroy noted in footnote 6 of his dissent (P. 43a), respondents' evidence on unprofitability is most suspect. He pointed out, *inter alia*, that respondents' "expert witness", John S. Buzzard, who prepared Exhibit 1 (A. 496a-596a; 60a), the crux of respondents' case, is an electrical engineer (A. 42a). Mr. Buzzard has no degree in accounting or economics (A. 49a), nor had he ever audited anyone's books for compensation (A. 51a).

Further, Justice Pomeroy pointed out that the data introduced did not purport to be a complete presentation of respondents' operations. The chancellor had found that some of respondents' garages were not included in Exhibit 1 and thus that the projection was distorted (Finding No. 17, P. 89a). Exhibit 1 did not include respondents' experience where they managed parking facilities on behalf of others for a fee (A. 98a-100a). Only that portion of the respondents' business directly related to parking was included in Exhibit 1 (A. 101a). The Buzzard Study did not include figures showing respondents' net profit or net loss (Finding No. 18, P. 89a). The conclusions were based

solely on operating income and operating loss (A. 65a-71a; 101a; 152a-153a). This is significant since the record does reveal that at least one of the respondents, Stanwix Auto Park, has added to its parking facility an office building and apartment, the income for which is not shown. Stanwix Auto Park owns 50% of the stock of the corporation which owns the office building and apartment (A. 170a). The advantage to the office-apartment complex of having attached parking may well be reflected in a statement of net profits.

Justice Pomeroy also noted that there was no showing of what portion of the operating expenses were salaries to the owners and what portion of the salaries really represented return on investment (P. 43a, footnote 6). This apportionment would be significant, as seven of the twelve respondents are owned or controlled by one man, John T. Stabile (A. 201a).

Significantly, Exhibit 1 represents only the experience of downtown lots, with few exceptions, and not the entire parking industry of the City of Pittsburgh (P. 53a). The spaces represented are those in the central business district of the City and exclude the majority of parking lot operators and their experience in other sections of the City including North Side, Oakland and East Liberty, where there are numerous parking facilities.

Certain other exhibits were also misleading, such as Exhibit 7 (A. 600a; 89a) showing only 20 public lots out of 80 and only 8 public garages out of 15. Likewise, Exhibit 6 considers only 3 garages (A. 599a; 85-88a).

Most important, however, respondents' case on unprofitability rests not on actual experience, but on a projection. As Justice Pomeroy stated (P. 43a), such projections are inherently inadequate when actual economic data exist for the period involved. In *Knoxville v. Water Co.*, 212 U.S. 1, 17 (1909), this Court reversed the decree of a lower court enjoining the enforcement of maximum water rates in a public utility situation. This Court held that where the case rested "not upon observation of the actual operations under the ordinance, but upon speculations as to its effect, based upon operations of prior fiscal years," it would not find confiscation if there was any doubt at all. The bill was dismissed without prejudice to its reinstitution if the actual operation of the ordinance should prove confiscatory.

B. Lack of Proof Re Confiscation

Assuming *arguendo* that respondents proved unprofitability, under no circumstances can mere unprofitability be considered a confiscation of respondents' property.

The majority below admits that, to prove confiscation, a party must ordinarily show both that the *industry* is being forced out of business and that the tax cannot be passed on to the customer. The first test was met here, says the majority, and the second, if not met directly, was satisfied inferentially because with the competition from the allegedly lower-priced "taxing body", an increase in rates by respondents would

simply have increased the disparity between their rates and those of the "taxing body".

Justice Pomeroy pointed out in dissent (P. 41a-42a) that a review of the record shows clearly that neither of these conclusions is supported by the evidence.

---

1. *No showing that the industry is being forced out of business.*

Consider first the majority's conclusion that the tax was forcing respondents out of business. The most obvious refutation of this is the fact that none of the respondents was out of business at the time of trial (P. 98a)and all are still in business (P. 43a). The fact that many in this industry allegedly cannot make a profit for a short period of time proves nothing. Many industries are in a like situation, and a 5% increase in a gross receipts tax surely cannot be the culprit for all of them.

Moreover, even if respondents had gone out of business, the parking tax could not have been the cause. Respondents' receipts, after the tax, either increased or remained stable when the tax rate was increased.[11] Respondents' labor costs and other operating expenses have increased also (A. 175a; 321a).

---

[11] After a 5% increase in the parking tax effective in 1969, respondents' revenue after deduction of parking taxes *increased* in the amount of $325,000 (A. 414a). After the 5% increase in parking tax effective February 1, 1970, respondents' revenues for the first six months of 1970, compared to the first six months of 1969, declined only $11,000 out of a total of $2,764,000, or 3/10 of 1% (A. 415a).

Furthermore, no taxing body can be held responsible for poor business practices on the part of private industry. Many of the respondents have locked themselves into long/term leases with no provision therein for readjustment if taxes escalate (A. 146a; 209a; 237-238a; 271a). In *New York Rapid Transit Corp. v. New York City,* 303 U.S. 573 (1938), this Court was not impressed by the argument that the private transit operators could not raise their prices because of a contract with the City. It was pointed out that a tax need not be meticulously tailored to each particular contract that the taxpayer might have entered into. Likewise, in *John McShain, Inc. v. District of Columbia,* 205 F. 2d 882, 883 (D.C. Cir. 1953), the Court held that a use tax on construction materials as applied to purchases made subsequent to the passage of the act under contracts made prior thereto, did not violate the due process clause of the fifth amendment:

> "The imposition of a new tax, *or an increase in the rate of an old one,* is one of the usual hazards of business enterprise: . . ." (emphasis added).

---

2. *No Showing That the Tax Cannot Be Passed On.*

Secondly, the majority below erred grievously in determining that the competition of the taxing body prevents the tax from being passed on to the consumer. In the first place, Ordinance No. 704 of 1969 by its terms imposes the tax on the Parking Authority, and at the time of trial, the Parking Authority was paying the tax.[12]

---

[12] As set forth in footnote 9 (P. 21a) of the majority opinion, the Court of Common Pleas of Allegheny County ruled that the

Argument

It is true that the Authority is exempt from real estate taxes and can borrow money at lower rates than respondents can.[13] This advantage is common to every governmental operation and consistent with the equal protection clause of the fourteenth amendment, *Puget Sound Co. v. Seattle, supra.* The extent of this advantage translated into parking rates nowhere appears in the record. In fact, the record shows that, while some

---

Parking Authority is exempt from this tax. *Public Parking Authority of Pittsburgh v. City of Pittsburgh,* No. 687 July Term, 1972. That decision was affirmed by the Commonwealth Court of Pennsylvania at No. 97 C.D. 1973 on January 14, 1974. Upon application by the City at No. 3579 Miscellaneous Docket 1974, the Supreme Court of Pennsylvania, by order dated January 23, 1974, granted an extension of time within which to file a petition for allowance of appeal to that Court. Said petition for allowance will be filed prior to March 20, 1974.

It should be noted that the Authority has always acknowledged its liability for the tax, was joined as a party-plaintiff without its permission, and filed a petition to strike it as a named plaintiff. The real plaintiffs in the case are some of the same parties as the respondents in this case.

Thus, respondents' lament that they are unable to raise their rates because of competition from the Parking Authority which need not pay the parking tax, even if true, fits the classic definition of *chutzpah*: the man who, having murdered his parents, begs mercy from the court because he is an orphan. Any harm resulting to respondents from the Parking Authority's not paying this tax is self-inflicted.

[13] It is also true, however, that the real advantage of the Authority garages is that they are more convenient, resulting in higher patronage, and more efficient, being self-service, whereas most of respondents' operations are attendant-operated, with resulting higher labor costs. The study made for the Parking Authority, respondents' Exhibit 11 (A. 614a-686a; 273a), states:

> "Self-parking characterizes the Authority garages, while the other public facilities continue to be almost entirely attendant-operated." (A. 635a).

of the Authority rates are lower than respondents', some are higher (A. 330a-331a). The majority is simply incorrect in its assertion that Authority rates are lower.

In at least five places in the majority opinion, Justice Roberts refers to the "lower rates" of the Parking Authority. In particular, the opinion notes (P. 14a):

> "For example, the record establishes that the average all day rate for the Public Parking Authority is about $2.00, while the average all day rate for private operators is approximately $3.00."

Justice Roberts used this alleged disparity in rates to attempt to show the inability of the operators to pass the tax on to the patrons (P. 17a-18a):

> "Clearly, if the private parking lot operators attempted to pass the full burden of the tax on to the consumers they would only succeed in increasing the disparity in the already disparate rates. For example, at the all day rate, shown in the record, if appellants were to attempt to pass the tax on to their patrons, their rates would increase from an average of $3.00 to $3.60, while a similar tax pass-on by the Public Parking Authority would increase their average rate from $2.00 to $2.40. Thus the differential in rates would increase from $1.00 to $1.20."

The fact is, however, that the assertion that the all-day rate is $2.00 for the Authority and $3.00 for the private operators is nowhere supported by the record, and is

simply incorrect. The record reveals that the Authority's all-day rate is higher than the private operators! Respondents' own expert testified that the Authority's average nine-hour rates were $2.56, compared with $2.37 for private operators (A. 330a). Since most parkers in the downtown area park for long periods of time, the average being close to six hours (A. 649a), the Parking Authority garages are more expensive for the bulk of consumers.

While respondents, in their Brief in Opposition, at pages 24-25, refer to certain exhibits which pick and choose among a few garages and are thus not representative (nor are they current, being for the year 1969), the 1970 average, testified to by respondents' own witness, showed that the Supreme Court of Pennsylvania completely misread the record.

Yet, even if Authority rates had been consistently lower than respondents', the basic fallacy in the reasoning below is that the Authority rates would not prevent respondents from passing the incidence of the tax on to consumers. As pointed out in Part III of Justice Pomeroy's dissent (P. 46a), the majority ignores elementary economics. It is undisputed that there is an unsatisfied demand for 4100 parking spaces in downtown Pittsburgh (P. 47a; 87a; A. 616a).[14] Respondents' Exhibit 11, Table 4, shows that facilities open to the public in the central business district, ex-

[14] The many opinions in this case have referred to a 4100 space deficiency. This is an "adjusted" space deficiency, taking into account operating efficiency, which is about 85-90%. To provide 4100 adjusted spaces, 4700 actual spaces are required (659a).

clusive of Authority garages, are 99.2% occupied at 2:00 p.m. on a typical weekday, and all facilities open to the public, including Authority garages, are at that time 102.9% occupied (A. 640a; 273a). Justice Pomeroy succinctly states (P. 47a-48a):

> ". . . an entrepreneur (the appellants) who controls 71% of the supply in a market of unsatisfied demand need not concern himself with a low-cost competitor (the Parking Authority) who controls 29% of the supply, has no excess capacity, and cannot service demand which the 71% competitor might drive away through price increases.
>
> * * * * * *
>
> "The presence of the Parking Authority in this picture, and its preferred status in terms of property taxes, is therefore in my view an irrelevant factor."

Respondents' argument that it cannot raise its prices despite a shortage of spaces is akin to gasoline dealer *A* saying, when faced with an increase in his wholesale cost, that he cannot raise his retail price because gasoline dealer *B* has a lower wholesale cost and thus can undersell him. Anyone who has attempted to purchase gasoline recently knows that *A* need not worry about his competion, since *B* cannot service any more demand. Likewise the Parking Authority, in a shortage situation, cannot service any more demand.

Every other business reacts to an increase in costs and taxes by raising the price of its product or increasing the charge for its services. Surely respond-

ents can do likewise, particularly when the demand for their services in the central business district far exceeds the supply.

Justice Pomeroy correctly points out that respondents' evidence that the tax cannot be passed on is woefully inadequate and is contrary to prior experience (P. 44a-46a). Testimony from one respondent that one cannot increase prices because of a tax increase, since "Why wouldn't you get that rate before?" (A. 30a), shows an ignorance of basic economics. The answer obviously is that competition would drive the rate lower. But where the added factor of a tax is present, the competition cannot reduce the price either.

The evidence as to Meyers Brothers is, as Justice Pomeroy states, of only marginal relevance (P. 45a). As he says, we are dealing with an entire industry raising rates, not simply one member raising its rates. Footnote 8 of Justice Pomeroy's opinion states that the Chatham Center Garage rates were lower in both 1970 and 1973 than in other downtown garages, thus indicating a less strategic competitive position. This is borne out dramatically by Table 11 of respondents' Exhibit 11 (A. 667a; 273a). While the chart shows an overall 4100 adjusted space deficiency in the central business district, there is a 3500 space *surplus* in Sector VI, where Meyers Brothers' facility is located (A. 237a; 666a). Meyers Brothers' operation is thus hardly representative of even the central business district parking industry as a whole.

Finally, in their Brief in Opposition, respondents point to the testimony of Donald McNeil that further

rate increases would discourage shoppers from coming into Pittsburgh (A. 292a). It would seem that this merely states a truism, for, unless demand is totally inelastic (merely a theoretical possibility), an increase in price will result in some decreased consumption. The relevant question is "How much?", and Mr. McNeil provides no answers. The experience of the industry, see *infra*, would indicate very little loss of consumption.

If anything more than this truism can be attributed to Mr. McNeil's testimony, it would be well to consider his credibility. He stated unequivocally that a parking tax of 10% would destroy the parking industry (A. 327a), despite the fact that the industry had existed quite well since 1962 when the 10% tax was enacted, and, in fact, according to respondents' Exhibit 1, earned on the average 8.2% in 1968 and would have earned in excess of 8% for each of 1969 and 1970 at a 10% rate (A. 503a). This Court's comment in *Knoxville v. Water Co.*, 212 U.S. 1, 18 (1909), is relevant here:

> "This ordinance has not actually been put into operation; the inferences were based upon the operations of the preceding year; and the conclusions of the court below rested upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties. . . ."

The actual experience of the industry supports the view that the tax can indeed be passed on to the consumer. General rate increases in the past have always resulted in an increase in gross receipts (P. 45a; A.

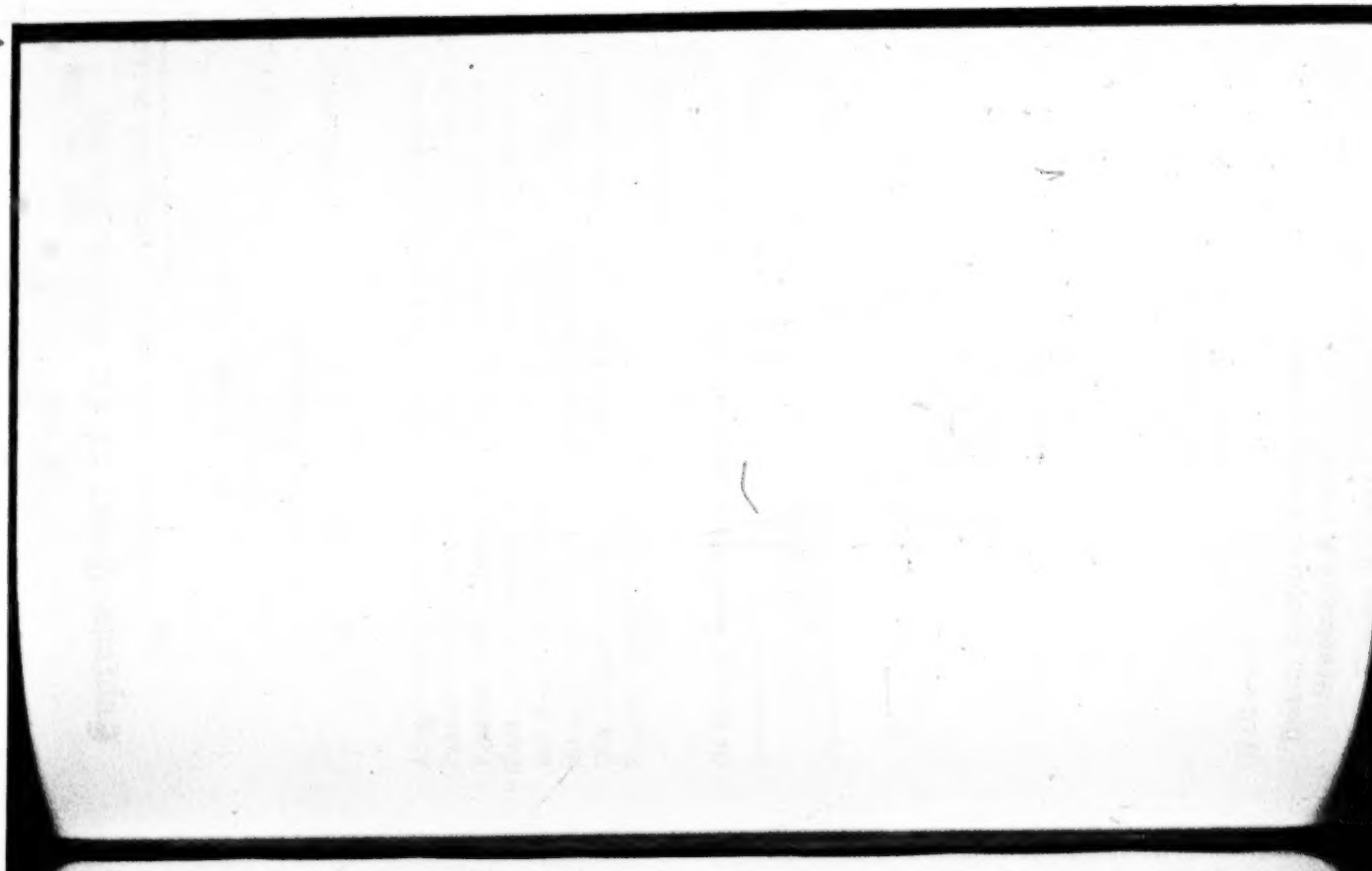
187a). The City experienced only a temporary reduction in the number of cars parked at its facility on the Wharf after it doubled its price for parking (A. 417a). Moreover, as can be seen from the Appendix to Justice Pomeroy's opinion (P. 49a), current rates are significantly higher than those which respondents sought to characterize as profit-maximized. Reality corresponds with theory: the Parking Authority cannot and has not prevented respondents from passing tax increases on to consumers.

Therefore, even if the argument that a high rate plus public competition constitutes a denial of due process were legally acceptable, that situation does not exist here.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court reverse the decree of the Supreme Court of Pennsylvania.

Respectfully submitted,
RALPH LYNCH, JR.,
City Solicitor,
GRACE S. HARRIS,
Special Asst. City Solicitor



IN THE

Supreme Court of the United States

October Term, 1973

MAR 28 1974
MICHAEL RODAK, JR., CLERK

No. 73-582

CITY OF PITTSBURGH,

Petitioner,

vs.

ALCO PARKING CORPORATION; ARENA PARKING, INC.; CAMPUS PARKING, INC.; FOURTH AVENUE PARKING, INC.; GRANT PARKING, INC.; HARRY W. SHEPARD, JR., t/a Stanwix Auto Park; JOHN COMINOS, t/a Liberty Parking; JOHN STABILE and ROCCO A. DEL SARDO, t/a Wm. Penn Parking Lot; K-SEVEN PARKING COMPANY; MEYERS BROS. PARKING-CENTRAL CORP.; PARKING SERVICE CORPORATION, INC.; WM. PENN PARKING GARAGE, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENTS

LEONARD BOREMAN
RICHARD H. MARTIN
Attorneys for Respondents
1018 Frick Building
Pittsburgh, Pennsylvania 15219

LEONARD M. MARKS
ERIC BREGMAN
Special Counsel for Respondent Meyers Bros. Parking-Central Corporation
595 Madison Avenue
New York, New York 10022

Of Counsel:

BASKIN, BOREMAN, WILNER, SACHS, GONDELMAN & CRAIG

GOLD, FARRELL & MARKS



INDEX

	PAGE
Questions Presented	1
Counter-Statement	2
Background Facts	3
The Facts in this Case	7
The Decision Below	11
Summary of Argument	13
Argument	
I. The 20 percent gross receipts tax combined with favored public competition resulted in a taking of respondents' property without just compensation	17
A. The Issues Before This Court	17
B. The General Principle: A Tax Demonstrated to Be Confiscatory Is Unconstitutional and Invalid	19
C. The City of Pittsburgh May Not Destroy Private Parking Operations by Confiscatory Selective Taxation While Participating in Competing Operations	22
D. The Authorities Cited by the Petitioner Are Inapposite	31
E. The Increasing Incidence and Intensity of Government Competition with Private Enterprise Place New Importance on the Takings Clause and Require Careful Judicial Scrutiny	36

PAGE

II. The doctrine of separation of powers does not apply to this case 40

A. The Courts of the United States Have Traditionally Exercised the Power of Judicial Review of State and Local Tax Laws 40

B. The Doctrine of Separation of Powers Has No Application in this Case Since the Pennsylvania Legislature Has Expressly Conferred the Power of Judicial Review 44

III. The record overwhelmingly supports the decision of the Supreme Court of Pennsylvania 47

A. The Effect of the 20% Tax 47

B. Respondents' Inability to Pass on the Tax 52

Conclusion 58

TABLE OF AUTHORITIES

Cases:

Air Reduction Co. v. Hickel, 420 F.2d 592 (D.C. Cir. 1969) 38
Alaska Fish Co. v. Smith, 255 U.S. 44 (1921) 32, 33
Albert v. Lehigh Coal, 431 Pa. 600, 246 A.2d 840 (1968) 10
Allegheny County v. Moon Township, 436 Pa. 54, 258 A.2d 630 (1969) 8
Armstrong v. United States, 364 U.S. 40 (1960) 24, 39
Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970) 38

Bowman v. Kansas City, 361 Mo. 14, 233 S.W.2d 26 (1950) 33
Brooks-Scanlon v. R.R. Comm'n, 251 U.S. 396 (1920) 39

PAGE

Carnock v. Filer, 392 Pa. 468, 141 A.2d 195 (1958) 10
City of Pittsburgh v. Public Parking Authority, *et al.*, —— Pa. Comm. Ct. ——, 314 A.2d 887 (1974) 8, 53
Continental Ore Co. v.. Union Carbide Corp., 370 U.S. 690 (1962) 38
Cowen v. Krasas, 438 Pa. 171, 264 A.2d 628 (1970) 10
Crosson v. Downington Area School District, 440 Pa. 468, 270 A.2d 377 (1970) 45

Dane v. Jackson, 256 U.S. 589 (1921) 21

Eastern Railroad President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1971) 38

Federal Power Commission v. New England Power Co., No. 72-1162, 42 U.S.L.W. 4308 (March 4, 1974) 43
Fox v. Standard Oil Company of New Jersey, 294 U.S. 87 (1935) 20, 32, 33, 42

Gate City Garage v. City of Jacksonville, 66 So.2d 653 (Fla. 1953) 33
Glenn v. Field Packing Company, 290 U.S. 177 (1933) 46
Grayson v. Harris, 267 U.S. 352 (1925) 10
Griggs v. Allegheny County, 369 U.S. 84 (1962) 24, 39

Hardin v. Kentucky Utilities Company, 390 U.S. 1 (1968) 38
Heiner v. Donnan, 285 U.S. 312 (1932) 20
Henderson Bridge Co. v. Henderson City, 173 U.S. 592 (1899) 20
Hillsborough Twp. v. Cromwell, 326 U.S. 620 (1946) 19

In re Liggins Estate, 393 Pa. 500, 143 A.2d 349 (1958) 10
In re Lohns Estate, 440 Pa. 268, 269 A.2d 451 (1970) 10
In re Pruners Estate, 400 Pa. 629, 162 A.2d 626 (1960) 10

PAGE

Jayne v. City of Detroit, 348 U.S. 802 (1954) 33

Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157 (1953) 10
Lynch v. Owen J. Roberts School District, 430 Pa. 461, 244 A.2d 1 (1968) 45

A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934) 19, 32, 33, 35
McCray v. United States, 195 U.S. 27 (1904) 20, 32, 33, 35
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) ..... 40 *et seq.*
McGillick v. City of Pittsburgh, No. 85 January Term (1963) (Court of Common Pleas of Allegheny County), *aff'd per curiam*, 415 Pa. 581, 203 A.2d 481 (1964) 7, 22, 55
McSorley v. Fitzgerald, 359 Pa. 264, 59 A.2d 142 (1948) 5

National Board of YMCA v. United States, 395 U.S. 85 (1969) 26, 27
National Cable Television Ass'n, Inc. v. United States, No. 72-948, 42 U.S.L.W. 4306 (March 4, 1974) 43
Nichols v. Coolidge, 274 U.S. 531 (1926) 20

Panhandle Co. v. State Highway Comm'n, 294 U.S. 613 (1935) 24, 39
Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218 (1928) 42
Parker v. Brown, 317 U.S. 341 (1943) 38
Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) 15, 22, 40
Philadelphia v. Eglin's Garages, Inc., 342 Pa. 142, 19 A.2d 845 (1941) 6, 22
Philadelphia v. Samuels, 338 Pa. 321, 12 A.2d 79 (1940) 6, 22, 45

PAGE

Pittsburgh & Allegheny Telephone Company v. Braddock Borough, 43 Pa. Super. 456 (1910) 44
Puget Sound Power and Light Co. v. Seattle, 219 U.S. 619 (1934) 34

Railroad Comm'n v. Eastern Texas R.R., 264 U.S. 79 (1924) 39
Rapid Transit Corp. v. New York, 303 U.S. 573 (1938) 34, 35, 36
Ritzman v. Coal Township School Directors, 317 Pa. 271, 176 A. 447 (1935) 44

Seattle Gas Co. v. Seattle, 291 U.S. 638 (1934) 34
SEC v. Fifth Avenue Coach Lines, Inc., 289 F.Supp. 3 (1968), *aff'd*, 435 F.2d 510 (2d Cir. 1970) 36
Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935) ..42, 46
Swallow v. United States, 325 F.2d 97 (10th Cir. 1963), *cert. den.*, 377 U.S. 951 (1962) 43

Tennessee Power Co. v. T.V.A., 306 U.S. 118 (1949) 38

United States v. Acker, 415 F.2d 328 (6th Cir. 1969), *cert. den.*, 396 U.S. 1003 (1970) 43
United States v. Causby, 328 U.S. 256 (1946) 24, 39
United States v. Kahriger, 345 U.S. 22 (1953) 32
United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) 24, 39
United States v. Keig, 334 F.2d 823 (7th Cir. 1964) 43
United States v. Sanchez, 340 U.S. 42 (1950) 32

Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 482 (1869) 35, 42

Wagner v. Baltimore, 239 U.S. 207 (1915) 20
Washington Avenue, 69 Pa. 352 (1871) 21
Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, —— Pa. Comm. Ct. ——, 314 A.2d 322 (1974) 3, 4, 44
Wolfe v. North Carolina, 364 U.S. 177 (1960) 10

PAGE

Statutes:

General County Assessment Law, Act of May 22, 1933, P.L. 853, 72 P.S. §5020-204(g) 8
Local Government Unit Debt Act, 1972, July 12, P.L. 185, §101, 53 P.S. §§11-202, 209.410 55
Local Tax Enabling Act of 1947, Act of June 25, 1947, P.L. 1145 ..... 3, 44, 45
Local Tax Enabling Act, December 31, 1965, P.L. 1257 §1 *et seq.*, 53 P.S. §6901 *et seq.* 3, 4, 16, 45
Parking Authority Law, Act of June 5, 1947, P.L. 458, 53 P.S. §341 *et seq.* 4, 5, 8, 16, 45, 55
Pittsburgh Business Privilege Tax, Ordinance No. 675 (1969) 17
Pittsburgh Parking Tax, Ordinance No. 674 (1968) 7
Pittsburgh Parking Tax, Ordinance No. 704 (1969) 3, 7
Pittsburgh Parking Tax, Ordinance No. 30 (1973) 3
Port Authority Act, 1956, April 6, P.L. (1955) 1414, as amended by Act of October 7, 1959, P.L. 1266; 55 P.S. §551 *et seq.* 6, 36
United States Constitution, Amend. 5 14

Miscellaneous:

Annual Reports of the Pittsburgh Controller 1966-1970 55
1947 Pennsylvania Legislative Journal—House 2094 .. 5
Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964) ..... 27 *et seq.*, 38
Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971) 30
Tucker's Blackstone, Commentaries 305-06 (Appendix) (1803) 38

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-582

CITY OF PITTSBURGH,

Petitioner,

vs.

ALCO PARKING CORPORATION; ARENA PARKING, INC.; CAMPUS PARKING, INC.; FOURTH AVENUE PARKING, INC.; GRANT PARKING, INC.; HARRY W. SHEPARD, JR., t/a Stanwix Auto Park; JOHN COMINOS, t/a Liberty Parking; JOHN STABILE and ROCCO A. DEL SARDO, t/a Wm. Penn Parking Lot; K-SEVEN PARKING COMPANY; MEYERS BROS. PARKING-CENTRAL CORP.; PARKING SERVICE CORPORATION, INC.; WM. PENN PARKING GARAGE, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENTS

Questions Presented

1. Should this Court affirm the decision of the Supreme Court of Pennsylvania that a selective 20% gross receipts tax imposed by a municipality upon private commercial parking facilities, combined with privileged government

competition in the same industry, effected a taking and confiscation of respondents' property without due process in violation of the Fifth and Fourteenth Amendments?

2. Do the courts of Pennsylvania and this Court have the power to review the constitutionality of municipal tax ordinances which result in takings of private property without due process?

3. Should this Court disturb the findings of the Supreme Court of Pennsylvania that the municipal 20% gross receipts tax was arbitrary, unreasonable and excessive, could not be passed on to customers because of privileged public competition, and effected a taking of property without due process?

Counter-Statement

Respondents, some of whom are corporations and others individuals, own and operate parking lots and garages in the City of Pittsburgh, representing approximately 71% of the total parking spaces in the central business district. Respondents operate approximately 17,000 of the 18,000 private spaces in this area. The Pittsburgh Parking Authority owns and operates 25% of the spaces in this area in direct competition with respondents. The central business district, referred to as "The Golden Triangle," is the commercial and financial center of the City and contains the overwhelming majority of all commercial parking facilities in Pittsburgh (A. 280a-281a, 626a; P. 2a, 62a, 53a).*

* References designated "A" are to pages of the two volume single Appendix filed by the petitioner.

References designated "P" are to pages of the Appendix to the Petition for Certiorari filed by the petitioner on October 1, 1973.

Background Facts

On February 20, 1970, 19 days after the effective date of Pittsburgh Ordinance No. 704 (Parking Tax Ordinance) (P. 103a-110a), respondents filed a complaint in equity in the Court of Common Pleas of Allegheny County seeking to restrain the City of Pittsburgh from enforcing the provisions of Ordinance 704, and seeking a refund of all taxes paid thereunder.[1]

The Parking Tax Ordinance, which was approved by the Pittsburgh City Council on December 31, 1969, was enacted pursuant to the Local Tax Enabling Act of December 31, 1965, P.L. 1257 §§1 *et seq.*, 53 P.S. §§6901 *et seq.* (the "Enabling Act"), which was a re-enactment in substantially the same form of the Local Tax Enabling Act of 1947, Act of June 25, 1947, P.L. 1145. The Enabling Act, commonly referred to as the "Tax Anything Act," con-

1. Initially, this litigation involved a suit in equity by respondents to enjoin the collection of parking taxes imposed pursuant to Ordinance No. 704 of the City of Pittsburgh, enacted December 31, 1969, which became effective on February 1, 1970, and for a refund of taxes paid thereunder. During the pendency of this lawsuit, however, the City of Pittsburgh enacted a new parking tax ordinance, Ordinance No. 30 of 1973, effective April 1, 1973, which superseded Ordinance No. 704 (P. 23a n.13). Unlike the challenged ordinance that imposed a 20% tax upon *parking operators* on their gross receipts from each non-residential parking operation, the new ordinance imposed a tax of 20% upon *patrons*, to be collected from the patrons by the operators. As the Commonwealth Court of Pennsylvania recently observed "The City by taxing the patron [in Ordinance No. 30 of 1973] sought to cure in advance the infirmity of confiscation of the operators' property found by the Supreme Court to be suffered by Ordinance No. 704." *Wm. Penn Parking Garage, Inc.* v. *City of Pittsburgh*, —— Pa. Comm. Ct. ——, 314 A.2d 322 (1974). Respondents' request for injunctive relief has therefore been rendered moot. Respondents' right to obtain a refund for taxes paid under former Ordinance No. 704 of the City of Pittsburgh remains open. The Supreme Court of Pennsylvania remanded the case to the Court of Common Pleas to determine the "nature and extent" of the refund to which respondents may be entitled (P. 27a).

ferred broad power on municipalities to raise revenues outside of traditional property taxes.

Section 6 of the Enabling Act expressly gives standing to any party aggrieved by a municipal ordinance passed pursuant thereto to appeal to the courts, and confers jurisdiction upon the state courts to invalidate the tax or to reduce the rates:

> "It shall be the duty of the court to declare the ordinance and the tax imposed thereby to be valid unless it concludes that the ordinance is unlawful or finds that the tax imposed is excessive or unreasonable; but the court shall not interfere with the reasonable discretion of the legislative body in selecting the subjects or fixing the rates of the tax. The court may declare invalid all or any portion of the ordinance or of the tax imposed or may reduce the rates of tax." 53 P.S. §6906.[2]

In 1947, the legislature of Pennsylvania enacted the Parking Authority Law, Act of June 5, 1947, P.L. 458, §§1, 53 P.S. §§341, *et seq.* (the "Parking Authority Act"), after having determined that a parking crisis existed in Pittsburgh and other cities, which required a joint and cooperative effort between private and governmental enterprise.

---

2. The Commonwealth Court of Pennsylvania recently reviewed the basis for the Local Tax Enabling Act of 1947 in considering a challenge to the 1973 ordinance (see footnote 1, *supra*):

> "While this vast delegation of the taxing power was generally approved as necessary, it was recognized as a new departure in municipal government, as evidenced by its popular name, the 'Tax Anything Act.' The Legislature, however, chose not to confer this broad power to find and to tax subjects and objects previously beyond the reach of local tax gatherers without also according the taxed a right to judicial review of the wide discretion thus given local officials. Section 6 provides this safeguard." *Wm. Penn Parking Garage, Inc.* v. *City of Pittsburgh*, —— Pa. Comm. Ct. ——, 314 A.2d 322 (1974).

Section 2 of the Parking Authority Act (53 P.S. §342) sets forth the underlying public policy:

> "(g) That this *parking crisis,* which threatens the welfare of the community *can be reduced* by providing sufficient off-street parking or parking terminal facilities, or both * * *
>
> * * *
>
> "(i) That it is *intended that the authority cooperate with all existing parking or parking terminal facilities, or both, so that private enterprise and government may mutually provide adequate parking services for the convenience of the public.*" (emphasis added)

As one of the co-sponsors of the Parking Authority Act stated:

> "* * * I do not believe that parking should become strictly a public operation. There are people in private enterprise there now and I believe that they should be permitted to remain there and the government should not take over their facilities and drive them out of business." 1947 Pennsylvania Legislative Journal—House 2094.

The Parking Authority Act was upheld in *McSorley* v. *Fitzgerald,* 359 Pa. 264, 59 A.2d 142 (1948).

In the present case, the Supreme Court of Pennsylvania recognized that the extensive public competition with the private sector in the parking industry as it now exists in Pittsburgh is contrary to the intent of the Pennsylvania legislature:

> "As appellants emphasize it is doubtful that the state Legislature ever intended the public parking author-

ities utilizing public financing advantages, to compete directly with private parking operators in this fashion. In fact, the declaration of policy in the Parking Authority Law of 1947 specifically provides: '* * * That it is intended that the authority cooperate with all existing parking facilities so that private enterprise and government may mutually provide adequate parking services for the convenience of the public;' Act of June 5, 1947, P.L. 458 §2, as amended, 53 P.S. §342. Nonetheless Pittsburgh parking operators are now not only denied the cooperation intended in the statute, but are actually confronted with direct, adverse competition from the Public Parking Authority." (P. 21a-22a)[3]

In *Philadelphia* v. *Eglin's Garages, Inc.*, 342 Pa. 142, 19 A.2d 845 (1941) and *Philadelphia* v. *Samuels*, 338 Pa. 321, 12 A.2d 79 (1940), the Pennsylvania Supreme Court upheld a 10% gross receipts tax imposed by the City of Philadelphia on open parking lots. The court based its decisions on its findings that there was no factual basis for claims that the tax was confiscatory. There was no public

---

3. The same conclusion concerning state legislative intent had been reached by Judge Kramer writing for the minority of the Commonwealth Court:

> "Authorities [referring to the Public Parking Authority] were not instituted for the purpose of making profits and therefore should show none." (P. 74a)

In this connection, Judge Kramer also stated:

> "We can take judicial notice of the published financial reports of the Public Parking Authority of Pittsburgh, which show that it consistently has earned handsome annual profits, including the test year, 1970." (P. 72a, fn. 1)

In a closely analogous situation, when the Pennsylvania legislature intended that local Port Authorities take over all transit operations within their jurisdictions, it specifically directed them to acquire all private transit operations and pay just compensation for them. Port Authority Act, 1956, April 6, P.L. (1955) 1414, as amended by Act of October 7, 1959, P.L. 1266; 55 P.S. §551 *et seq.* at 563.1.

competition aspect in these cases since the public parking authorities had not yet been created.

In 1962, the City of Pittsburgh for the first time enacted a 10 percent gross receipts tax on all commercial parking facilities. *McGillick* v. *City of Pittsburgh*, No. 85 January Term, 1963 (Court of Common Pleas, Allegheny Co.), *aff'd per curiam*, 415 Pa. 581, 203 A.2d 481 (1964), upheld this tax in a *per curiam* opinion affirming the finding that there was "nothing in the record before us to indicate that the tax rate of 10 percent of the gross receipts is excessive or confiscatory." No claim was made concerning public competition in *McGillick* and that issue was not discussed by the Court.

On December 28, 1968, the City of Pittsburgh enacted a new parking tax ordinance, Ordinance No. 674, effective February 1, 1969, which superseded the 1962 ordinance and raised the rate of taxation on gross receipts of non-residential parking operations to 15 percent. On December 31, 1969, Ordinance No. 704, effective February 1, 1970, was enacted increasing the 15 percent tax to 20 percent of gross receipts and prompting the present litigation (P. 103a-110a).

The Facts in This Case

The facts in this case were unanimously established by the Commonwealth Court of Pennsylvania and were accepted by the Supreme Court of Pennsylvania. Each of the appellate courts agreed that "the *undisputed evidence* on this record" (P. 62a, emphasis by Court) demonstrates:

"1. There are about 24,300 parking spaces in the City of Pittsburgh. Of this number 6100 are served by a

public parking authority, subjected to this tax,[4] but exempt from other taxes including those on real estate. Of the balance of about 18,000 spaces, the plaintiffs here owned or operated about 17,000.

"2. Based upon six months' operations and a sound statistical projection for the balance of the year 1970 with expenses computed at 1969 rates, that portion of the industry represented by appellants, would, during the year 1970, earn gross revenues of over $8,000,000, pay $1,600,000 on account of this tax and sustain a loss of $270,000. Of the fourteen appellant enterprises nine would sustain losses and of the others the one showing the largest profit would earn an amount equal to only 2.9% of its gross revenues.

"3. The appellants are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher rates, but also because the appellants are in competition with a public authority which, exempt from other taxes, can charge less.

"4. The rate of tax was increased from fifteen per centum effective in 1969 to twenty per centum, although in 1969 the appellants lost $26,000 on gross

4. The Court of Common Pleas of Allegheny County in *Public Parking Authority, et al.* v. *City of Pittsburgh*, No. 687 July Term, 1972, has ruled that the Parking Authority is totally exempt from Pittsburgh's 20% gross receipts tax since its parking garages, being "public property used for public purposes," are exempt from all taxes. This decision has recently been unanimously upheld by the Commonwealth Court of Pennsylvania. *City of Pittsburgh* v. *Public Parking Authority, et al.*, No. 97 C.D. 1973, —— Pa. Comm. Ct. ——, 314 A.2d 887 (1974). See also *Allegheny County* v. *Moon Township*, 436 Pa. 54, 258 A.2d 630 (1969); General County Assessment Law, Act of May 22, 1933, P.L. 853, 72 P.S. §5020-204(g); Parking Authority Law, Act of June 5, 1947, P.L. 458, 53 P.S. §355. The Court below noted: "Even if the Authority had to pay the tax to the City it would mean only in reality an accounting transaction, transferring dollars from one pocket of an instrumentality of City government to another." (P. 21a, n. 9)

revenues of about $7,700,000 on which they paid a tax under this ordinance of more than $1,400,000." (P. 62a-63a)

The facts found by the Commonwealth Court were accepted by the Supreme Court of Pennsylvania and restated as follows:

"After the imposition of the 20 percent gross receipts tax appellants' projected figures for 1970 show that out of 14 different parking lot operators in downtown Pittsburgh nine would sustain operating losses. Of the five operators earning a profit only two would achieve a return of one percent or better. The highest return projected for any of the 14 operators in 1970 was 2.9 percent.

"Moreover, the evidence produced by appellants indicates that as the gross receipts tax increases from the original ten percent to the present 20 percent the percentage and number of parking lots unable to achieve any profit doubles. Again based on projections for 1970, when compelled to pay the 20 percent gross receipts tax, 65 percent of the individual lots would sustain operating losses. If the tax had remained at 15 percent, only 37 percent of the lots would fail to earn a profit. If the tax was reduced to its original ten percent, then only 30 percent of the lots would sustain losses." (P. 14a-15a)

* * *

"The Commonwealth Court unanimously agreed that the tax was imposed at an unreasonable rate * * * [and] * * * also unanimously agreed, contrary to the chancellor's findings, that 'appellants are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher rates but also *because the appellants are in competition with a*

public authority which, exempt from other taxes, can charge less.' " (Emphasis in opinion below) (P. 16a)

• • •

"Appellants, on this record, have shown that more than 'an occasional operator cannot afford to continue in business.' However, the chancellor found that appellants have made no significant attempt to pass the tax on to the consumer. As noted previously the Commonwealth Court was of the unanimous opinion that the tax could not be passed on to the consumer because of the competition from the Public Parking Authority. Clearly if the private parking lot operators attempted to pass the full burden of the tax on to the consumers they would only succeed in increasing the disparity in the already disparate rates. For example, at the all-day rates shown in the record, if appellants were to attempt to pass the tax on to their patrons, their rates would increase from an average of $3.00 to $3.60, while a similar tax pass-on by the Public Parking Authority would increase their average rate from $2.00 to $2.40. Thus the differential in rates would increase from $1.00 to $1.20." (P. 17a-18a)[5]

---

5. The City's reliance on the unsupported findings in the Court of Common Pleas is erroneous. Those findings were unanimously reversed by the Commonwealth Court in accordance with Pennsylvania law. *In re Lohns Estate*, 440 Pa. 268, 269 A.2d 451 (1970); *Cowen* v. *Krasas*, 438 Pa. 171, 264 A.2d 628 (1970); *Albert* v. *Lehigh Coal*, 431 Pa. 600, 246 A.2d 840 (1968); *In re Pruners Estate*, 400 Pa. 629, 162 A.2d 626, 628 (1960); *In re Liggins Estate*, 393 Pa. 500, 143 A.2d 349 (1958); *Carnock* v. *Filer*, 392 Pa. 468, 141 A.2d 195 (1958).

The factual findings of the Pennsylvania appellate courts are conclusive and should not be subject to review here. *Wolfe* v. *North Carolina*, 364 U.S. 177, 196 (1960); *Lloyd A. Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160 (1953); *Grayson* v. *Harris*, 267 U.S. 352, 357-58 (1925).

In any event, the record overwhelmingly supports the findings of the Pennsylvania appellate courts. See pp. 47 to 57, *infra*.

The Decision Below

The Supreme Court of Pennsylvania held that the combination of public competition in the parking industry by the Public Parking Authority, which enjoys important and wide-ranging governmentally granted competitive advantages, plus the arbitrary 20% gross receipts tax which was so excessive and unreasonable that it appropriated the entire profit of the private operators, constituted a taking without due process or compensation. Among the Parking Authority's competitive advantages cited by the court were exemptions from payment of taxes, lower interest rates, and long-term public financing:

> "• • • the Public Parking Authority is blessed with certain other legislatively bestowed advantages and able, therefore, to charge lower rates. The Parking Authority is exempt from payment of all real estate taxes because of the exclusion given to public property used for public purposes. Because lower interest rates are granted to municipal corporations seeking to borrow money, the Parking Authority is able to arrange cheaper and longer term financing. This also reduces significantly the rates charged by the Authority, and increases in intensity the degree and nature of its direct competition with the private parking lot operators. It is certainly undeniable that the Parking Authority is able to finance its site and construction costs through the attractive medium of long term, lower interest public financing, with all the benefits which attend such governmental arrangements not available to private businessmen.[6] See *Price* v. *Philadelphia Parking Authority*, 422 Pa. 317, 355, 221 A.2d 138, 148 (1966). It is the combination of these factors

6. 53 P.S. §346 (40 year tax exempt bond authorization); §349 (power of eminent domain); §355 (exemption from real, personal property and excise taxes).

which creates the extraordinary competitive advantage which the Public Parking Authority is able to exert over the non-governmental parking lot owners and operators.

"Not only is the Parking Authority able to charge lower rates than private operators, but with the enactment of the 20 percent gross receipts tax the taxing body now appropriates for itself practically all of the earnings of the private parking lot operators. By taking 20 percent of gross revenues 'off the top' the City effectively confiscates what were formerly the earnings of the parking lot owners. This confiscation is practically as complete as if the City had condemned without compensation the private lots to erect public facilities. In this situation it is unnecessary for private lot operators to prove that they cannot pass the tax on to their customers (although as previously noted the Commonwealth Court found this was not possible). See *Samuels,* supra; *Eglin,* supra. Clearly by raising their rates the private operators would greatly increase the already significant rate differential between private and public parking lots. The public competition thus effectively prohibits private lot operators from increasing their rates and passing the tax on to their patrons, while the imposed tax appropriates whatever earnings were formerly produced. Where such an unfair competitive advantage accrues generated by the use of public funds, to a local government at the expense of private property owners, without just compensation, a clear constitutional violation has occurred." (P. 22a-24a)

• • •

"It must be concluded that the unreasonably burdensome 20 percent gross receipts tax, causing the majority of private parking lot operators to operate their businesses at a loss, in the special competitive circum-

stances of this case, constitutes an unconstitutional taking of private property without due process of law in violation of the Fourteenth Amendment of the United States Constitution." (P. 26a)

Summary of Argument

I. The highest court of the Commonwealth of Pennsylvania has properly invalidated a municipal 20% gross receipts tax, enacted pursuant to a state enabling act. The municipality, the City of Pittsburgh, seeks review. This case presents a unique and unprecedented combination of elements: (1) a 20% municipal gross receipts tax, which is so unreasonable and excessive as to appropriate to the municipality the *entire earnings* of the privately owned commercial parking industry; (2) the selective imposition of this tax solely on the parking industry, with the result that this small class is taxed thirty-four times more than any other business in the city; (3) public control of 25% of the parking market in direct competition with the private sector, using governmentally-granted privileges including broad tax exemptions and long-term low-interest public financing to undercharge the private sector and make it impossible for the 20% gross receipts tax to be passed on to patrons; and (4) an explicitly stated intent of the Pennsylvania legislature, when it authorized public entry into the parking industry, to prevent exactly the sort of devastating competition with the private sector which has arisen in Pittsburgh. The Supreme Court of Pennsylvania found that as a result of the *combination* of all these elements the 20% gross receipts tax constituted a taking without due process.

Pittsburgh's 20% gross receipts tax directly supports its own public enterprise. The City has increased the tax from 10% to 15% to 20% and thereby appropriated all of the economic benefits of ownership of the entire parking industry. It directly receives the profits from the 25% of the market which it controls. It has appropriated, through its 20% gross receipts tax, all of what were formerly the profits of the private parking operators—the remaining 75% of the market.

Pittsburgh has not outlawed the parking industry, nor has it sought to regulate it as being undesirable. On the contrary, it has found that industry of such importance that public participation is justified. Having established its own commercial enterprise in this field, the municipality improperly used its powers as a government to both compete with and selectively tax the private sector so extremely that it appropriated to itself all of the economic benefits of ownership as completely as if it had exercised its power of eminent domain. It thereby rendered worthless the previously valuable property of the private parking operators.

II. This Court has recognized that the Takings Clause* is not static, but must be construed in the context of dramatically increasing participation by government in the economy as a commercial competitor of private enterprise. Numerous cases have held that governmental activity imposing losses on individual property owners while concurrently benefiting a government enterprise constitutes

* "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." United States Constitution, Amend. 5.

an illegal taking and confiscation of private property. The Takings Clause provides fundamental constitutional protection against oppressive economic burdens selectively imposed on a narrow segment of the population for the benefit of the public generally.

In effect, the City of Pittsburgh has acquired full ownership of the private sector of the parking industry by its combination of arbitrary taxation and privileged governmental competition. The City could have taken over the entire parking industry through eminent domain by paying just compensation. Alternatively, it could have expended sufficiently large amounts of public funds through its Parking Authority to increase its share of the market, although this would have been contrary to the state legislature's intent. If the City had followed either of these routes, the financial burden of its political decision would have been distributed among all its citizens. Instead, the City has taken a short-cut which places the entire burden of its political decision on the private parking operators—a minute segment of its citizens. "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922).

Prior cases permitting taxation to drive out undesirable industries, or allowing public competition with private enterprise, are not applicable here because none involved the combination of selective taxation which eliminates all profits of an industry plus government enterprise competition preventing profitable private operation, all in contravention of expressed legislative intent. The City may not

constitutionally select its private competitors as targets for an excessive and crippling tax that prevents any potential profit in the entire industry so that the City's competing commercial enterprise is enhanced.

III. Both the courts of Pennsylvania and of the United States have traditionally exercised the power of judicial review of state and local tax laws to assure that constitutional rights have not been abused under the guise of taxation. The Pennsylvania legislature, in its Local Tax Enabling Act, has expressly conferred broad powers of judicial review upon its state courts to protect against municipal taxing abuses.

The decision of the Supreme Court of Pennsylvania was largely predicated on its construction of Pennsylvania's Parking Authority Law and Local Tax Enabling Act and numerous prior state decisions regarding state policy concerning municipal taxes. The record overwhelmingly supports the decision of the Supreme Court of Pennsylvania that the 20% gross receipts tax destroyed the private parking industry in Pittsburgh without any basis, and that the wide disparity between public and private parking rates made it impossible for the private sector to avoid confiscation of its former profits by increasing its charges to patrons. In anticipation of the decision below, the City's ordinance was superseded during this litigation by a new parking tax which is imposed on patrons, rather than parking operators, and applies equally to patrons of public and private parking facilities. The invalidation of the 20% municipal tax ordinance by the highest court of Pennsylvania should not be disturbed.

ARGUMENT

I

The 20 percent gross receipts tax combined with favored public competition resulted in a taking of respondents' property without just compensation.

A. The Issues Before This Court

This case presents a unique combination of three elements on which the Pennsylvania Supreme Court based its opinion: (1) a selective municipal tax found by the highest court of the state as well as its intermediate appellate court to be so excessive and unreasonable as to confiscate virtually all profits of the private sector of the industry; (2) direct and favored public competition in the same industry; (3) leading to a result in the industry directly contrary to state legislative intent and policy in authorizing public entry into the field. No prior case in this Court or in the Pennsylvania courts has presented this combination of factors.

The tax in question is not a general tax on the citizens of Pittsburgh, or its businesses or other institutions. On the contrary, the entire burden of this excessive and unreasonable tax is selectively placed on a minute segment of the business community—the commercial parking industry. As a result, this small segment of the community pays over *34 times* the taxes of any other business within the City.[7]

7. Pittsburgh's Business Privilege Tax, Ordinance No. 675 (1969), imposes a 6 mill tax on the gross receipts of all businesses in the City (A. 601a-607a). The private parking operators, who are subject to both the Business Privilege Tax and the 20% Parking Tax, pay a tax of 206 mills on their gross receipts. Stated more succinctly, the parking operators are paying 34⅓ times the taxes on all other businesses in Pittsburgh.

The issue in this case was framed by the Supreme Court of Pennsylvania as follows:

> "This controversy presents the interesting and novel question of whether the enactment, by a municipal government, of a 20 percent gross receipts tax upon all non-residential, commercial parking facilities in that municipality, combined with direct government competition in the form of a public parking authority, charging lower rates, has resulted in an unconstitutional taking and confiscation of private property without due process of law." (P. 1a-2a).

This case does *not* present the question of whether Pittsburgh has the power to tax a business—even out of existence—where the City is functioning as the regulator or arbitrator between conflicting public or private interests, and is not itself a participant in the industry in question. Nor does this case present the simple issue whether a public body may participate in activities traditionally part of the private sector in competition with private enterprise.

The sole question in this case is whether the City of Pittsburgh may determine that parking facilities are a valuable asset to the City, use governmental advantages to enter into and become one of the dominant factors in the industry, and then impose a selective, crippling tax, aimed solely at its private competitors in this limited industry, which has the effect of appropriating all of the economic benefits of ownership of the private parking facilities as completely as if the City had exercised its right of eminent domain.

The Supreme Court of Pennsylvania correctly found that the combination of an unreasonable, excessive 20%

gross receipts tax plus favored government competition constituted a taking without due process:

> "Clearly the City of Pittsburgh is acting in an enterprise capacity by operating a publicly financed parking lot which competes with private industry. To the extent that the Public Parking Authority has gained an unfair competitive edge over private parking lot owners through tax exemptions and lower rates, and more importantly appropriated an unreasonable proportion of their revenues via the gross receipts tax, a taking requiring just compensation has occurred. In the absence of any compensation a taking without due process of law results." (P. 25a, n. 14).
>
> • • •
>
> "This governmental enterprise competing with private industry adds not only a new and most significant dimension to the traditional constitutional problem of what constitutes a taking without due process but also an impermissible one." (P. 26a).

B. The General Principle: a Tax Demonstrated to Be Confiscatory Is Unconstitutional and Invalid.

This Court has repeatedly held that a tax which rises to the level of confiscation of property is invalid under the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution. There can be no question that the states, in the exercise of their taxing power, are subject to the requirements of these clauses. *E.g., Hillsborough Twp.* v. *Cromwell*, 326 U.S. 620, 623-24 (1946).

In *A. Magnano Co.* v. *Hamilton*, 292 U.S. 40 (1934), upon which the City of Pittsburgh relies, this Court recognized the principle that a state or local tax may violate

the due process clause of the Fourteenth Amendment if the taxing statute:

> "be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, *as for example, the confiscation of property.*" (emphasis added)

Similarly, in *Henderson Bridge Co.* v. *Henderson City*, 173 U.S. 592, 614-15 (1899), Justice Harlan stated:

> "It is conceivable that taxation may be of such a nature and so burdensome as properly to be characterized a taking of private property for public use, without just compensation * * * [if] such taxation by its necessary operation is really spoliation under guise of exerting the power to tax."

See also, *Heiner* v. *Donnan*, 285 U.S. 312, 326 (1932) ("That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process clause of the Fifth Amendment is settled."); *Nichols* v. *Coolidge*, 274 U.S. 531, 542 (1926) ("This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment."); *Fox* v. *Standard Oil Co. of New Jersey*, 294 U.S. 87, 100-01 (1935); *Wagner* v. *Baltimore*, 239 U.S. 207, 219-20 (1915); *McCray* v. *United States*, 195 U.S. 27, 63-64 (1904).

As the Supreme Court of Pennsylvania simply stated:

> "Undoubtedly, if a tax is shown to be confiscatory it is utterly impermissible and a violation of the Constitution." (P. 17a).

Moreover, this Court has often indicated that a state tax law which "proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—'to spoliation under the guise of exerting the power of taxing,'" will be deemed violative of the Fourteenth Amendment. *Dane* v. *Jackson*, 256 U.S. 589, 599 (1921).

The Pennsylvania courts have also long recognized that confiscatory taxation violates the Pennsylvania Constitution. In *Washington Avenue*, 69 Pa. 352 (1871), the Supreme Court of Pennsylvania declared a tax unconstitutional which assessed particular landowners in a number of townships for the building of roads that would be of a general public benefit. Holding that the power of taxation is constitutionally limited, and that confiscation of property through taxation is unconstitutional, the Supreme Court of Pennsylvania stated:

> "There is a clear implication from the primary declaration of the inherent and indefeasible right of the property, followed by the clauses guarding it against specific transgressions, that covers it with an aegis of protection against all unjust, unreasonable and palpably unequal exactions under any name or pretext. Nor is this sanctity incompatible with the taxing power, or that of eminent domain, where for the good of the whole people, burdens may be imposed or property taken.
>
> "I admit that the power to tax is unbounded by any express limit in the constitution. * * * But nevertheless taxation *is* bounded in its exercise by its own nature, essential characteristics and purpose. It must therefore visit all alike in a reasonably practicable way of which the legislature may judge, but within the just

limits of what is taxation. Like the rain it may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation, extortion not assessment, and falls within the clearly implied restriction in the Bill of Rights." *Id.* at 363.

The same standard was applied to parking taxes in *Philadelphia* v. *Samuels*, 338 Pa. 321, 12 A.2d 79 (1940); *Philadelphia* v. *Eglin's Garages, Inc.*, 342 Pa. 142, 19 A.2d 845 (1941), and *McGillick* v. *City of Pittsburgh*, No. 85 January Term, 1963 (Court of Common Pleas of Allegheny Co.), *aff'd per curiam*, 415 Pa. 581, 203 A.2d 481 (1964).

In sum, both federal and Pennsylvania authorities hold that confiscatory taxation is unconstitutional and invalid.

C. The City of Pittsburgh May Not Destroy Private Parking Operations by Confiscatory Selective Taxation While Participating in Competing Operations.

Although the situation presented here has never been considered in the context of a *taxing* case, numerous cases have held that other government activity which causes losses to individual property owners *while concurrently benefiting a government enterprise*, constitutes an illegal taking and confiscation of private property.

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), for example, a private company had sold the surface rights in certain land to a town, retaining the underlying mineral rights. The Pennsylvania legislature sought to enhance

and protect its interest in maintaining public highways by enacting a statute to foster street safety. It was clear that the statute would have made it commercially impracticable for private enterprise to mine the underlying coal it owned. This Court, reversing the Pennsylvania Supreme Court, held that the statute amounted to an unconstitutional taking of property without compensation in violation of due process standards. Justice Holmes wrote:

> "It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. • • • *What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.*" (*Id.* at 414-15) (emphasis added)
>
> • • •
>
> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. • • • We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court." (*Id.* at 415-16)
>
> • • •
>
> "We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that

would warrant the exercise of eminent domain. *But the question at bottom is upon whom the loss of the changes desired should fall.*" *Id.* at 416 (emphasis added) (citations omitted)

Similarly, this Court has held that public authorities may not advance their interest in developing local air routes or airport facilities by frequent and regular flights over private property at low altitudes which impair the value of such property. Such governmental activity amounts to an unconstitutional taking of a property easement, unless the government compensates the private owners. *United States* v. *Causby*, 328 U.S. 256 (1946) (military airplanes); *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), *reversing* 402 Pa. 411, 168 A.2d 123 (county-operated airport).

Again in *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799 (1950), the government was prohibited from actively enhancing its interest in a government dam by raising the underground water table, where this actively caused economic loss to the nearby private agricultural landowners.

See also *Panhandle Co.* v. *State Highway Comm'n*, 294 U.S. 613 (1935) (pipeline company could not be required to move its high pressure lines at its own expense in order to permit government construction of a highway over its lines).

Moreover, this Court has recognized that the Takings Clause prescribes government action which too selectively imposes the burdens of government activity. In *Armstrong* v. *United States*, 364 U.S. 40 (1960), the government con-

tracted to purchase certain ship hulls. Sub-contractors on the project obtained liens against the hulls. The general contractor defaulted on his contract with the United States, the United States took title, and the sub-contractors sought to exercise their liens. The United States resisted the sub-contractors' claims on the ground of sovereign immunity. This Court held that the sub-contractors could not exercise their liens, but that the actions of the government in effectively destroying those liens, in order to promote the government's own economic interest as a purchaser of goods, constituted a taking without due process because the burden on these sub-contractors was simply too great in comparison with the benefits obtained:

> "It is true that not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense. This case and many others reveal the difficulty of trying to draw the line between what destructions of property by lawful governmental actions are compensable 'takings' and what destructions are 'consequential' and therefore not compensable.
>
> "The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with

an intent and purpose of extinguishing the liens or not, the Government's action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment. Neither the boats' immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary.

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here." 364 U.S. at 48-49 (citations omitted).

Similarly, in *National Board of YMCA* v. *United States*, 395 U.S. 85 (1969), the fundamental constitutional protection against undue economic burdens imposed selectively on a narrow class for the benefit of the government generally was described as follows:

"The Just Compensation Clause was 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' *Armstrong* v. *United States*, 364 U.S. 40 (1960); see also *United States* v. *Sporenbarger*, 308 U.S. 256, 260 (1939)." 395 U.S. at 89-90.

• • •

"For a general discussion of the purpose of the Just Compensation Clause, see Michelman, Property,

Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law, 80 Harv. L. Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964)." (Footnote by the Court, *Id.* at 90, n.2.)

The *YMCA* decision endorses the analysis by Professor Sax in Takings and the Police Power, 74 Yale L.J. 36 (1964), which the Supreme Court of Pennsylvania found "indeed logical and facilitates our analysis here" (P. 24a, n. 14). The court below noted at length:

> "Professor Sax has suggested a test for determining when just compensation is due private property owners as a result of governmental activity. In Professor Sax's view government interacts with the private sector in two ways. First government 'governs,' i.e., 'it mediates the disputes of various citizens and groups within the society' and 'resolves the conflict among competing and conflicting alternatives.' *Id.* at 62. Secondly government acts in an enterprise capacity in which it acquires economic resources for its own account and thereby competes with private industry. *Id.*
>
> "Professor Sax states that: '* * * when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power.' *Id.* at 63.
>
> "More specifically he adds: '* * * when an individual or limited group in society sustains a detriment to legally acquired existing economic values as

a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.' 'To be sure, the acquisition of title or the taking of physical possession will be present in the great majority of taking cases under this theory. But—and this is the important point—the presence or absence of a formal title-acquisition and/or invasion will never be conclusive. These formalities are not necessarily present when the government, as an enterpriser, is acquiring resources for its own account.' *Id.* at 67.

"Such an approach is indeed logical, and facilitates our analysis here. *Clearly the City of Pittsburgh is acting in an enterprise capacity by operating a publicly financed parking lot which competes with private industry. To the extent that the Public Parking Authority has gained an unfair competitive edge over private parking lot owners through tax exemptions and lower rates, and more importantly appropriated an unreasonable proportion of their revenues via the gross receipts tax, a taking requiring just compensation has occurred. In the absence of any compensation a taking without due process of law results.*" (P. 24a-25a, n. 14) (emphasis added)

Professor Sax's analysis is directly applicable to the present case where extreme taxation is selectively applied in order to divert all the profits of the private operators to the City, thus enhancing the City both directly through the tax and indirectly by advancing its competitive interests. As Professor Sax notes, every tax is necessarily a "taking," but that is not the end of the inquiry:

"Likewise, it is recognized that every tax technically fits the description of a taking as formulated here (just as it does, incidentally, under the old Harlan invasion theory). But here, too, the temptation to turn the proposed rule into an intellectual plaything must yield to an attempt to find workable rules for a real world. *Of course a government act is not immunized from the compensation provision of the Constitution merely because it has been labelled a tax.* But most taxes are not takings because they incorporate precisely the goal which the compensation rule is designed to achieve: they spread the cost of operating the governmental apparatus throughout the society rather than imposing it upon some small segment of it. Once that cost has been broadly diffused, though perhaps not to every member of the society nor to each in identical amount, it would seem that the essential problem of the taking provision, as delineated earlier, would be overcome.

"With these perspectives in mind, it should be possible to approach the problem fruitfully. In essence, a court ought to ask itself these questions: first, does this case raise the sort of issue with which the taking provision was designed to deal; that is, does it present a case of essentially individualized cost-bearing of some public improvement? If the answer to this question is no, as it is with most tax measures, then the constitutional issue may be dismissed forthwith. Second, is some privilege being invoked which must be recognized as an exception to the compensation rule, such as the right to impose fines in a criminal proceeding? Unless the answer here is yes, we must then go on to ask the last question: is the loss incurred here a consequence of resource-acquisition by a governmental enterprise? The response to that final question should determine the issue of compensation." 74 YALE L.J. 75, 76 (emphasis added)

In the case of the City of Pittsburgh's 20% gross receipts tax, the three elements of a taking are all present. The tax is selectively imposed upon private parking operators. Because of the favored competition at lower rates from the Parking Authority, the private operators cannot pass on the tax burden to their customers, so that the tax becomes a classic example of "individualized cost-bearing." In effect, all of the profits of this small group of parking lot operators are being appropriated for the general public good. There is no "recognized exception to the compensation" in this case. Most important, it cannot be questioned that the taxes imposed directly support a government enterprise, and the overall confiscatory effect of an unreasonable tax which cannot be passed on, flows directly from the City's competing enterprises. In Professor Sax's words this "should determine the issue of compensation."[8]

The City has taken *all* the economic benefits of the parking industry: it directly receives the "handsome" profits of its tax-sheltered public parking authority, while at the same time it appropriates to itself alone, through its confiscatory 20% tax, all the profits of the privately "owned" lots. In effect, the City thus "owns" every parking lot in its jurisdiction, although formal title to some of the lots remains in respondents' names. The City has thus "taken" respondents' valuable property as completely as if the City had condemned their parking lots for the purpose of erecting parking authority buildings.

---

8. Professor Sax further refined his analysis of the takings clause in a later article, "Takings, Private Property and Public Rights," 81 Yale L.J. 149 (1971). This second article is concerned primarily with public rights in land deriving from the need for ecological conservation and planning. It does not discuss taxation nor modify the application of his original article to the present case.

There is no doubt that a taxing ordinance which provided that private parking operators had to pay to the City 100% of the *net profits* from their business would be a patently unconstitutional taking of respondents' property without compensation.[9] The combination of the City's confiscatory 20% *gross receipts* tax and the privileged competition of its parking authority produces the same unconstitutional result—the City is receiving all of the potential profits that could possibly be made from respondents' businesses.

In sum, the City of Pittsburgh has gone far beyond its power to curtail, regulate or eliminate certain activities through its taxing and police powers. It has placed an immense and insuperable economic burden on respondents which at the same time serves to benefit directly and substantially a governmental enterprise operating in nose-to-nose competition with respondents' businesses. The City has relegated to itself alone the ability to operate nonresidential parking garages profitably, and shortly will be the sole parking lot operator within its jurisdiction. This amounts to a blatantly unconstitutional confiscation of respondents' property without compensation, due process or equal protection.

D. The Authorities Cited by the Petitioner Are Inapposite.

The City of Pittsburgh relies on cases which do not deal with the particular question presented here. First, none of the prior precedents cited in which a governmental

9. As even the dissent in the Supreme Court of Pennsylvania acknowledged. (P. 40a-41a)

entity was allowed to "curtail and hinder as well as tax"[10] involved the unique situation of government acknowledging the desirability and need for the activity by itself participating in it, while destroying private operators by direct anti-competitive and prohibitive taxation. *E.g., A. Magnano Co.* v. *Hamilton,* 292 U.S. 40 (1934) (state tax on butter substitutes); *Alaska Fish Company* v. *Smith,* 255 U.S. 44 (1921) (state tax on persons manufacturing fish oil); *McCray* v. *United States,* 195 U.S. 27 (1904) (federal tax on butter substitutes); *Fox* v. *Standard Oil Co. of N.J.,* 294 U.S. 87 (1935) (higher state tax on chain-owned service stations than on independent service stations); *United States* v. *Sanchez,* 340 U.S. 42 (1950) (tax on marijuana). These cases all involved either taxation to drive a particular disfavored industry from the taxing jurisdiction or the imposition of taxes to disadvantage one class of private business and to aid another sector of private industry.[11]

10. *United States* v. *Kahriger,* 345 U.S. 22, 27 (1953) (tax on business of accepting wages).

11. See, *e.g., McCray* v. *United States, supra,* in which the Court stated, 195 U.S. at 64:

> "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights."

(footnote continued on next page)

In the three cases repeatedly cited by petitioner—*Magnano, Alaska Fish* and *McCray*—the taxpayers challenged only the high rate of taxation of what were then considered noxious or undesirable businesses. None of these cases involved governmental competition with private enterprise, and are not applicable to this case, where the crippling 20% tax on all private operators was imposed by the City after the Pennsylvania State Legislature had specifically recognized the beneficial importance of this industry, authorized public entry to build needed additional parking facilities, and mandated cooperation between the Public Parking Authority and existing private facilities.

The second line of cases cited by the City—*Jayne* v. *City of Detroit*, 348 U.S. 802 (1954); *Gate City Garage* v. *City of Jacksonville*, 66 So.2d 653 (Fla. 1953); and *Bowman* v. *Kansas City*, 361 Mo. 14, 233 S.W.2d 26 (1950)—does not involve taxes at all, but is limited to the question of whether public competition is permitted in fields previously occupied by private enterprise. That issue has been long settled, and is not being re-litigated here. In none of these cases was there a question as to the propriety of any tax, much less a confiscatory, selective tax aimed at the private sector after the government had commenced its competing operations.

Fox v. *Standard Oil of New Jersey*, 294 U.S. at 100:

"[T]he state may tax the large chains more heavily than the small ones, and upon a graduated basis, as indeed we have already held. Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry. In principle there is no distinction between such an exercise of power and the statute upheld in Magnano Co. v. Hamilton, supra, whereby sales of butter were fostered and sales of oleomargarine repressed." (Citations omitted)

Similarly, in *Puget Sound Power & Light Co.* v. *Seattle*, 291 U.S. 619 (1934), upon which petitioner heavily relies, the basic issue was not whether the City's tax was arbitrary or confiscatory, but whether there was a denial of equal protection in placing *any* tax on a private light and power utility when there existed a competing government-owned public utility. That case, along with its companion, *Seattle Gas Co.* v. *Seattle*, 291 U.S. 638 (1934), was decided upon a demurrer by the City of Seattle to the respective complaints, so that there were no factual findings at all by the highest state court such as those presented here—there was no finding that the tax was unreasonable (it was 3%, compared with 20% here), or that it appropriated all of the profits of the private company; there was no finding that any private company had suffered financial losses by reason of the tax, or that its continued existence was in jeopardy; there was no finding that the public utility was favorably competing with the private utility or even serving the same customers; there was no finding that the public utility's operations conflicted with the intent of the state legislature in creating it. In short, in *Puget Sound*, this Court was not presented with a factual record detailing the combined impact of confiscatory selective imposition of a prohibitive tax plus favored government competition, contrary to state enabling legislation. In *Puget Sound* this Court only had to decide whether the imposition of *any* tax on the private sector constituted a *per se* violation of equal protection. Finally, the light and power utility in *Puget Sound* was a regulated monopoly, which has historically been held to be an especially appropriate class for tax purposes. See generally, *Rapid Transit Corp.* v. *New York*, 303 U.S. 573, 578-81 (1938) and cases cited therein.

Veazie Bank v. *Fenno*, 75 U.S. (8 Wall.) 482 (1969), is also inapposite. That case turned on a basic issue of federalism—whether the national government could tax and restrain state bank franchises under national currency powers without violating the reserved powers of the states. 75 U.S. at 547-49. The case did not involve government competition with the private sector, since both the national banks which benefited by the tax and the disadvantaged state banking associations were all private-interest corporations, and not instrumentalities of any government. 75 U.S. at 535, 538-39. *Veazie Bank's* holding that a tax may constitutionally cast a heavy burden on one class of private corporations is consistent with the later *Magnano-McCray* line of cases which permits the taxing power to be used to discourage one segment of a private industry while fostering competing *private* operations.

Similarly, *Rapid Transit Corp.* v. *New York, supra,* involved a tax on all utilities doing business in New York City. The action was brought by a number of private mass transit lines who challenged their inclusion within the class of utilities on the ground that such classification was a denial of equal protection. No question was raised of a government taking without due process, and there was no discussion whatsoever of any competition with government operations. There was no finding that there was any such competition at all. In fact, the court found that the complaining private utilities were licensed public service organizations which were protected from other private competition by statute, which "of itself (is) a sufficient advantage over ordinary businesses to warrant the imposition of a heavier tax burden." 303 U.S. at 580. The Court held:

> "Since carriers or other utilities with the right of eminent domain, the use of public property, special

franchises or public contracts, have many points of distinction from other businesses, including relative freedom from competition, especially significant with increasing density of population and municipal expansion, these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions." *Id.* at 579.

In other words, *Rapid Transit* involved exactly the opposite situation as that presented here, since the City had there effectively granted a geographical monopoly to each of the private transit lines, protecting them from competition generally, rather than entering into competition with them itself. Moreover, when the City of New York has politically decided to assume control of mass transit lines within its jurisdiction it has not taken a shortcut and imposed the burden selectively on the private owners, it has acquired the lines directly and paid for them. *E.g., SEC v. Fifth Avenue Coach Lines, Inc.*, 289 F. Supp. 3, 9-10 (1968), *aff'd*, 435 F.2d 510 (2d Cir. 1970) (New York City's acquisition of private bus lines by condemnation).[12]

E. The Increasing Incidence and Intensity of Government Competition with Private Enterprise Place New Importance on the Takings Clause and Require Careful Judicial Scrutiny.

The crucial fact of this case, which cannot be too often repeated, is that the City of Pittsburgh, when it enacted the 20% gross receipts tax, was not acting as an arbitrator between conflicting interests in the community. The City

12. See discussion of Pennsylvania Port Authority Act at n. 3, *supra*.

of Pittsburgh does not contend here that it concluded that parking facilities were undesirable, and thereupon imposed a tax which would drive such facilities away. On the contrary, the City of Pittsburgh determined that public parking facilities were so desirable, and their control so important, that it decided to take over all such facilities within its jurisdiction. It directly acquired 25% of the facilities and imposed a tax which diverted to itself alone all of the economic benefit of the remaining 75%.

The City of Pittsburgh, through its Parking Authority, could have exercised its right of eminent domain to take actual possession of the privately-owned parking facilities. 53 P.S. §349. If it had done so, compensation would have been paid, thus placing on the general population the burden of its political decision to control all parking within its jurisdiction. The City of Pittsburgh could also have raised additional millions of dollars by issuing bonds to construct many more publicly-owned parking facilities, and may thereby effectively have cornered the market on parking within its jurisdiction, although this would have been contrary to the legislature's intent. Again, the City would have distributed the financial burden of its political decision to control parking throughout the general population through taxation to pay the interest and amortization on such bonds. But the City of Pittsburgh did not take either of the two routes just described. Instead, it took a shortcut to its desired end of control of parking facilities by building only 25% of the parking spaces and simultaneously imposing a 20% gross receipts tax on the private operators which had the same effect as condemnation. The crucial difference is that by taking the shortcut the City of Pittsburgh

passed the burden of its political decision to a tiny segment of its citizens—the private operators. Such action is precisely what the Takings Clause was designed to prevent. It is almost indistinguishable from the classic historic example which the framers of the Constitution sought to avoid—the arbitrary and oppressive obtaining of supplies for the Army and other public purposes by impression on an arbitrarily chosen small segment of the population. Tucker's Blackstone, Commentaries, 305-06 (Appendix) (1803), quoted in Sax, *op. cit., supra,* 74 Yale L.J. at 58.

This Court has become increasingly sensitive to the tremendous growth of government at all levels and the consequent conflicts between government enterprise and the private sector. Thus, for example, this Court has expanded the doctrine of standing in recognition of the economic reality of government competition and the need for judicial scrutiny of its impact on private enterprise. Compare *Hardin* v. *Kentucky Utilities Company,* 390 U.S. 1, 5-7 (1968), with *Tennessee Power Co.* v. *T.V.A.,* 306 U.S. 118, 146-47 (1939). See also *Association of Data Processing Service Organizations* v. *Camp,* 397 U.S. 150 (1970); *Air Reduction Co.* v. *Hickel,* 420 F.2d 592 (D.C. Cir. 1969).

Similarly, the Court has narrowed the immunity from the antitrust laws of government-related activity in order to protect the private sector and to foster the open market concepts underlying these statutes. Compare *Continental Ore Co.* v. *Union Carbide Corp.,* 370 U.S. 690, 707-08 (1962), with *Parker* v. *Brown,* 317 U.S. 341, 351-52 (1943), and *Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961).

This Court has properly recognized that the "takings" concept is not a technical one, but must be applied to a wide variety of governmental activity that results in injury to private property for public benefits. The thrust of the cases cited at pages 22 to 26 above is that government cannot avoid its obligation to pay just compensation by utilizing forms other than traditional condemnation to enhance its own enterprises. *E.g., United States* v. *Causby,* 328 U.S. 256 (1946), and *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962) (low flying airplanes over private property as a result of government owned airport); *United States* v. *Kansas City Life Ins. Co.,* 339 U.S. 799 (1950) (damage to private farmers caused by government dam raising water table); *Panhandle Co.* v. *State Highway Comm'n,* 294 U.S. 613 (1935) (burden of moving pipelines because of construction of government highway could not be shifted to pipeline company); *Armstrong* v. *United States,* 364 U.S. 40 (1960) (effective nullification of liens by interposition of sovereign immunity is a taking); *Brooks-Scanlon* v. *R.R. Comm'n,* 251 U.S. 396, 399 (1920) and *Railroad Comm'n* v. *Eastern Texas R.R.,* 264 U.S. 79, 85 (1924) (due process prevents state regulation which would require railroad to operate at a loss).

In the present case, the City of Pittsburgh, by its direct privileged public competition and arbitrary selective taxation of private parking operators has gone to the most extreme lengths to take the economic benefits of respondents' property and to deny them compensation. In its zeal to control this industry, however well motivated, this municipality has gone far beyond the constitutional balance struck by the takings clause between public need and private

rights. The Supreme Court of Pennsylvania correctly held that the City of Pittsburgh must either pay for the property taken or seek alternative means to achieve its desired ends which preserve this constitutional balance. As Justice Holmes presciently stated:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U.S. at 416.

II

The doctrine of separation of powers does not apply to this case.

A. The Courts of the United States Have Traditionally Exercised the Power of Judicial Review of State and Local Tax Laws.

The City of Pittsburgh asserts that "separation of powers" requires this Court to erase the constitutional power of judicial review of municipal ordinances in the field of taxation. Petitioner relies on cases such as *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819) which were not concerned with the impact of excessive and unreasonable tax rates on businesses in competition with the governmental taxing authority and raises the spectre of the destruction of the governing body itself.

Petitioner's argument is misplaced. First, separation of powers is a federal doctrine, which, in appropriate cases, indicates that federal courts should defer to Congress and the President on constitutional challenges. It has no application to this Court's review of acts of municipalities. Second, in this case the highest court of Pennsylvania determined that Pittsburgh's selective tax was unconstitutional. The Pennsylvania Supreme Court is the final authority on the scope of its own power to review municipal ordinances in that state.

Petitioner misreads *McCulloch* and the evolution of the doctrine of separation of powers. Petitioner excerpts lengthy quotes from the *McCulloch* opinion, culminating in the well known statement of Chief Justice Marshall that "the power to tax is the power to destroy." But the reason that *McCulloch* was an historic turning point in the development of constitutional law is not Chief Justice Marshall's memorable phrase, but the holding of the case, which struck down the state tax in question and definitively established the very doctrine petitioner attacks—judicial review of the constitutionality of taxes levied by state governments and instrumentalities:

> "But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a question of construction." 17 U.S. at 427

"If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of the instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States." 17 U.S. at 431-32[13]

Were this Court to agree with the City's argument, which is strikingly similar to that unsuccessfully advanced by the State of Maryland in *McCulloch*, it would signal a departure from the traditional role of courts to implement constitutional protection against governmental abuses, reaffirmed in Justice Holmes' well-known dissent in *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928):

"It seems to me that the State Court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. *But this Court which so often has defeated the attempt to tax in certain ways can*

13. In support of its separation of powers thesis, the City also cites *Fox* v. *Standard Oil Co. of New Jersey*, 294 U.S. 87 (1935); *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550 (1935) and *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533 (1869). However, in each of these cases the court asserted its power of judicial review, and, in *Stewart Dry Goods*, actually struck down the state tax.

defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits. ..The power to fix rates is the power to destroy if unlimited, but this Court while it endeavors to prevent confiscation does not prevent the fixing of rates." (Emphasis added)

This Court has reasserted the continued validity of the doctrine of judicial review as recently as March 4, 1974 in *National Cable Television Ass'n, Inc.* v. *United States et al.*, No. 72-948, 42 U.S.L.W. 4306, 4307 n.4 (March 4, 1974), which quoted Justice Holmes' formulation with approval. See also *Federal Power Commission* v. *New England Power Co.*, No. 72-1162, 42 U.S.L.W. 4308 (March 4, 1974); *Swallow* v. *United States*, 325 F.2d 97 (10th Cir. 1963), *cert. den.*, 377 U.S. 951 (1964); *United States* v. *Keig*, 334 F.2d 823 (7th Cir. 1964); *United States* v. *Acker*, 415 F.2d 328 (6th Cir. 1969), *cert. den.*, 396 U.S. 1003 (1970).

This doctrine was followed by the Supreme Court of Pennsylvania which, after reviewing the authorities suggesting that an excessive tax "standing alone" is not sufficient for judicial intervention, noted further that:

> "[T]hese same courts have acknowledged that in exceptional circumstances the taxing power of the Legislature may be abused, and, if so, it would violate both the Fifth and Fourteenth Amendments." (P. 19a)

B. The Doctrine of Separation of Powers Has No Application in This Case Since the Pennsylvania Legislature Has Expressly Conferred the Power of Judicial Review.

The Pittsburgh Parking Tax Ordinance was a municipal ordinance enacted pursuant to a delegation of power contained in the Local Tax Enabling Act of 1965 passed by the legislature of Pennsylvania. In Section 6 of that Act [53 P.S. §6906] the legislature conferred plenary power upon the state judiciary to review municipal taxes, not only with regard to the validity of such taxes, but also the reasonableness of the tax rate. As the Commonwealth Court observed in *Wm. Penn Parking Garage* v. *City of Pittsburgh, supra,* this judicial review was a necessary adjunct to protect against municipal abuse in view of the extensive new delegation of taxing power to local officials. The Commonwealth Court stated:

> "Section 6, read in the light of these principles and of the history of the legislation of which it is a part, does not offend Article 2, Section 1 of the Pennsylvania Constitution. Certainly the power to invalidate a taxing measure in whole or in part is not the power to tax. Not only have the courts long exercised this power without thought of violating thereby the separation of powers doctrine, both the Superior and Supreme Courts have reviewed and invalidated taxes in proceedings commenced under Section 3 of the Act of 1947."[14]

14. Even prior to the original Local Tax Enabling Act of 1947, Pennsylvania appellate courts held that the judicial power extended to review of the reasonableness of municipal ordinances. *Ritzman* v. *Coal Township School Directors,* 317 Pa. 271, 176 A. 447 (1935); *Pittsburgh & Allegheny Telephone Company* v. *Braddock Borough,* 43 Pa. Super. 456 (1910).

Thus, as the court below found, the Pennsylvania courts are specifically empowered to determine the validity of tax rates where, as here, the tax ordinance is imposed pursuant to the Local Tax Enabling Act.[15]

In sum, Pennsylvania law, both by express legislative enactment in the Local Tax Enabling Act and by repeated decisions of its highest court, provides for state judicial review of municipal taxing ordinances. Accordingly, the doctrine of separation of powers has no application here.

Moreover, the decision of the Pennsylvania Supreme Court turns on intricate interpretations of state law—the construction of two Pennsylvania statutes (the Local Tax Enabling Act and the Parking Authority Law), and the application of numerous prior state court decisions interpreting state policy toward municipal taxes. Since the *Samuels* decision in 1940, the Supreme Court of Pennsylvania has repeatedly reviewed municipal parking tax ordinances. Since the Local Tax Enabling Act of 1947, the Pennsylvania courts have specifically been delegated the power to review, invalidate and reduce such taxes. In the Parking Authority Law of 1947, the Pennsylvania legislature expressed the state's policy of private and public cooperation in the parking industry. In its decision in the pres-

15. The fact that, in the instant case, the matter was brought before the Pennsylvania courts in a suit in equity rather than pursuant to the specific statutory appeal procedure set forth in Section 6 of the Local Tax Enabling Act is of no consequence. The Pennsylvania Supreme Court held that the exclusiveness of the statutory appeal procedure does not apply where the taxing statute is made the subject of a constitutional challenge. *Crosson* v. *Downington Area School District*, 440 Pa. 468, 475, 270 A.2d 377, 380 (1970); *Lynch* v. *Owen J. Roberts School District*, 430 Pa. 461, 465-66, 244 A.2d 1, 3 (1968). See discussion in opinion of court below, P. 6a-8a, n. 2, 3.

ent case, the highest state court found that the operations of the municipal Parking Authority were in direct conflict with the intentions of the state legislature (P. 21a-22a). Under these circumstances, the federal courts may properly defer to the state judiciary in reviewing and invalidating a municipal tax.[16]

---

16. For example, in *Glenn* v. *Field Packing Company*, 290 U.S. 177 (1933), this Court held that the federal courts should defer to the state courts all decisions regarding the validity of state tax legislation where the taxing statute was invalidated by application of state law. There, the Kentucky Constitution established grounds for invalidating the tax independent of any federal ground. As Mr. Justice Cardozo stated in *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550, 577-578:

> "There is no need to consider in respect of an excise upon sales whether the doctrine of Magnano Co. v. Hamilton, 292 U.S. 40, 54 S.Ct. 499, 78 L. Ed. 1109, and Fox v. Standard Oil Co., supra, could be invoked successfully to uphold a destructive measure of taxation if the standard of validity were to be looked for in the Fourteenth Amendment and not in any other law. The significance of whatever distinctions there may be will be weighed when the event arises. For the present it is enough to say that, under the Constitution of Kentucky as interpreted by repeated decisions of her highest court, no tax law in the nature of an excise will be upheld if its effect is so drastic as to extinguish profits altogether. Because of those decisions, we refused only recently to sustain a statute of Kentucky imposing a prohibitory tax upon the sale of oleomargarine (Glenn v. Field Packing Co., 290 U.S. 177, 54 S.Ct. 138, 78 L.Ed. 252, affirming (D.C.) 5 F. Supp. 4), though in Magnano Co. v. Hamilton, supra, a like tax, adopted by the state of Washington, was held to be consistent with the Constitution of the nation. The relevant provisions of the Kentucky Constitution and of the explanatory judgments of her courts are written by implication into the Kentucky tax act as if put there in so many words. The act is to be interpreted as if it said: 'The tax hereby imposed is not to be collected if the result will be to wipe out the profits of a business conducted with ordinary efficiency, or to reduce the profits to a level unreasonably low.'" (dissenting opinion) (citations omitted)

III

The record overwhelmingly supports the decision of the Supreme Court of Pennsylvania.

A. The Effect of the 20% Tax

The record in this case overwhelmingly supports the conclusion of the Supreme Court of Pennsylvania that the Pittsburgh 20% gross receipts tax was unreasonable and confiscatory and, in combination with favored public competition, effected an arbitrary taking of respondents' property. The devastating impact of the tax on the entire private parking industry in the City of Pittsburgh is amply demonstrated by the financial statements contained in the record[17] (Plaintiffs' Exhibit 1, A. 496a-596a). In location after location, these statements confirm the confiscatory effect of the 20% tax in conjunction with the direct favored competition of the Pittsburgh Parking Authority. The

17. Plaintiffs' Exhibit 1, received into evidence without objection at trial (A. 59a-60a), was prepared under the direction and supervision of Donald M. McNeil, who was conceded by the Assistant City Solicitor to be a leading expert in the field of parking and traffic (A. 274a). Mr. McNeil's qualifications are set forth at length in Plaintiffs' Exhibit 12 (A. 687a). Significantly, Mr. McNeil was technical advisor to the Pittsburgh Regional Planning Association which, in 1945, prepared a report for the Allegheny Conference on Community Development (A. 278a). It was largely on the basis of this report that the Public Parking Authority Law was enacted in 1947 and the Pittsburgh Parking Authority ultimately established (A. 278a).

1970 figures[18] underscore the destructive effect of the 20% gross receipts tax:

Operator	*Number of Locations*	*Total Gross Parking Revenue 1970*	*Total Income (Loss)*	*Income as % of Revenue*	*Record Reference (Plaintiffs' Exhibit 1)*
Alco Parking Corp.	10	$1,446,446	(5,981)	—	A. 50b
William Penn Parking Lots	9	661,571	(3,703)	—	A. 51b
Parking Service Corp.	3	1,965,264	(118,887)	—	A. 53b
Arena Parking Inc.	2	404,048	729	0.2%	A. 54b
Fourth Avenue Parking Inc.	2	550,964	16,126	2.9%	A. 56b
William Penn Parking Garage Inc	1	130,613	(5,384)	—	A. 53b
Campus Parking Inc.	1	146,136	(19,048)	—	A. 54b
Grant Parking Inc.	1	320,178	(62,429)	—	A. 55b
Oliver Plaza Garage	1	282,273	650	0.2%	A. 55b
Liberty Avenue Lots	1	175,403	536	0.3%	A. 56b
Stanwix Auto-Park	3	638,895	(13,604)	—	A. 56b
Liberty Parking	7	146,380	(41,906)	—	A. 57b
Meyers Parking System	1	1,015,188	17,377	1.7%	A. 58b
K-Seven Parking Co., includes St. Francis Hospital Lot	4	285,549	(34,175)	—	A. 59b
Total Industry	46	$8,169,558	(269,699)	—	

18. The formula used by respondents' expert in rendering the 1970 projection is set forth in detail in the forward to Plaintiffs' Exhibit 1 (A. 496a-501a) as well as in the testimony of Mr. Buzzard (A. 60a-61a). Contrary to the City's claim here (Pet. Br. 39) respondents' 1970 figures were based on actual receipts and expenditures.

The Commonwealth Court unanimously found that respondents' undisputed financial figures were "based upon six months' operations and a sound statistical projection for the balance of 1970, with expenses computed at 1969 rates" (P. 62a). The Supreme Court of Pennsylvania agreed (P. 14a, n.5). The case was tried in September, 1970, before the actual receipts of the entire year of 1970 were available. Exhibit 1 contains the actual figures for 1968 and 1969 and those of the first six months of 1970.

The only projection made was that for the last six months of 1970. Since revenues through June 30, 1969 were 49.4 percent of that year's total revenues, the statistician applied precisely the same percentage to respondents' actual revenues through June 30, 1970 to project their revenue for the balance of 1970 (A. 61a-63a). Moreover, the expense side of respondents' financial statements was handled very conservatively, by using the assumption that respondents'

The uncontested figures established that the industry lost $270,000 on an $8 million gross in 1970 while paying $1.6 million in parking taxes to Pittsburgh. Only two of respondents' operations showed a return of 1% or better. Of the 46 separate parking locations, two-thirds incurred losses.[19]

Since few businesses in the United States return anything approaching 20% profits on gross receipts, it is hardly surprising that the 20% gross receipts tax has made it impossible for the parking industry in Pittsburgh to sur-

---

expenses other than taxes and wages would not increase from 1969 to 1970 and by minimizing the effect of recent wage increases (A. 64a-65a, 500a-501a). Thus, respondents' losses from parking operations for 1970 under the 20 percent gross receipts tax were actually substantially greater than those reflected in Plaintiffs' Exhibit 1.

19. Detailed examination of the financial statements of individual respondents reinforces the conclusion that the 20% gross receipts tax is confiscatory. Meyers Brothers' Chatham Center Garage, for example, increased its gross parking revenues from $967,325 in 1969 to $1,015,188 in 1970—an increase of approximately $48,000. At the same time, by more efficient management, Meyers Brothers was able to reduce its operating expenses by $12,000. Despite increased gross revenue and decreased expenses in 1970, Meyers Brothers' financial problems worsened because the 20% tax increased by over $62,000 to a staggering burden of $198,977 (A. 585a-588a). Because of this, Meyers Brothers' $1 million gross hardly produced any net profit at all. Meyers Brothers' profits dropped from 6.4% in 1968 under a 10% tax, to 3% in 1969 under a 15% tax to 1.7% in 1970 under the 20% tax (A. 585a-588a).

This pattern is reflected throughout respondents' financial documents. A typical location, Sixth and Penn Garage, indicates a 1970 gross of $370,445 with an operating loss of $23,902 at the 20% tax rate. Had the tax remained at 15%, the loss would have been $6,862. At a 10% rate there would have been a profit of $11,660, a return of 3.1% on the 1970 gross (A. 69a-70a, 503a).

The entire Stanwix Auto Parking operation with a gross of $638,895 in 1970 lost $13,604 at the 20% tax rate. At a 15% rate there would have been a profit of $15,631, a 2.4% return on the $638,895 gross (A. 70a, 564a). Total parking revenues for Alco Parking for 1970 were $1,446,446, leading to a $5,981 loss under the 20% tax. Had the tax remained at the 15% rate, there would have been a $56,755 profit, returning 3.9% of the gross (A. 71a, 503a).

vive economically. Seymour Gline, the Vice President of Meyers Parking Systems in charge of 200 national locations, testified that it was not financially feasible for a major parking operator to realize a profit with the 20% parking tax in effect (A. 268a). Moreover, Mr. Gline testified that he was not aware of any major parking operation in the United States which makes a profit of 20% of gross receipts (A. 269a). Major parking operator Harry Shepard, Jr. also testified that the 20% tax had deprived Pittsburgh's parking operators of the ability to sell or even refinance their businesses (A. 160a, 164a-165a).

Petitioner argues that the record fails to establish a confiscation of respondents' property, claiming that there was no showing that respondents' businesses are unprofitable, or that the tax cannot be passed on to parking patrons (Pet. Br. 37 *et seq.*).[20] Respondents submit that the record as a whole and Plaintiffs' Exhibit 1 (A. 496a-596a) in particular establish the total inability of all but a few of respondents' parking operations to show a profit. Both Pennsylvania appellate courts found this to be the case on the basis of "undisputed evidence" (P. 62a, 14a-16a). The City's attack on respondents' financial evidence was re-

20. The City's claim is based on its ill-conceived and belated attack on the credibility of Plaintiffs' Exhibit 1 as well as the qualifications of John S. Buzzard, who the City misidentifies in its brief as respondents' "expert witness." As previously stated in footnote 17 above, Donald M. McNeil was respondents' expert witness. John S. Buzzard was retained by Mr. McNeil to assist him in the compilation of material and preparation of the statistical exhibit received into evidence at trial as Plaintiffs' Exhibit 1 (A. 60a). Plaintiffs' Exhibit 1 was prepared on the basis of financial data supplied to Mr. Buzzard by accountants for each respondent (A. 45a). Respondents also attested at trial to the accuracy of these figures (A. 22a-23a, 199a-203a, 238a) which were not contradicted by the City. Mr. Buzzard's qualifications include extensive experience in the compilation and analysis of statistical materials (A. 41a-49a, 293a-295a). The trial court found Mr. Buzzard fully qualified (A. 56a-57a).

jected by both the Pennsylvania Commonwealth Court and Supreme Court (P. 62a, 17a-18a).[21]

21. Petitioner's brief, utilizing a shotgun approach, seeks to cast doubt on the conclusive findings of the appellate courts below. A few examples of the City's misreading of the record include the following:

(a) The claim of omissions of certain garages which distort respondents' data (Pet. Br. 37).

Four of respondents' parking operations were omitted from Exhibit 1. Inclusion of these facilities would have distorted the exhibit *in respondents' favor* (A. 133a-135a, A. 94a-95a, A. 97a-99a, A. 111a-112a). The Allegheny Center Garage financial statements, which were not included in Exhibit 1 were separately introduced in evidence (A. 609a-613a), and show an operating *loss* of $222,949 in 1969 alone. The inclusion of this tremendous loss in Plaintiffs' Exhibit 1, however, would have unfairly increased the industry's total loss, because Allegheny Center's adverse financial condition was caused by unusual factors peculiar to that parking facility. The remaining three operations not included were facilities where respondents managed parking facilities for flat fees and had no financial stake in profits or losses. In these management operations, the parking tax was irrelevant since respondents received their fixed management fees, even if the parking tax caused losses for the operations (A. 94a-95a, A. 245a-246a). The Commonwealth Court expressly and unanimously rejected the City's claim that these operations were improperly omitted (P. 62a, fn. 3).

(b) The claimed failure to calculate net profits and losses (Pet. Br. 37-38).

Respondents' net operating profits and losses from each parking facility owned or operated by them are included in Exhibit 1 (Plaintiffs' Exhibit 1; A. 496a-596a). Petitioner now claims that the exhibit should have included income and loss from property and investments not related to parking (Pet. Br. 38). Such items as apartment, office and retail store leases have nothing to do with parking operations or the 20 percent parking tax. Similarly, the City's claim that salaries to parking operators may have been inflated (Pet. Br. 38) is without the slightest support in the record. Exhibit 1 clearly contains all wages and salaries and shows no basis for any claim of inflation. The City is unable to cite a single page of the record to support its contention.

(c) The claim that gross receipts increased after tax increase (Pet. Br. 40).

The City's claim is based on erroneous and confusing testimony by its Treasurer (A. 412a-415a). The record contains no document or exhibit supporting the City's contention. Rather, the Treasurer testified concerning a compilation not offered in evidence, nor explained

(footnote continued on next page)

The City's response to respondents' demonstration that the 20 percent gross receipts tax has confiscated their property is a simplistic argument that "none of the respondents was out of business at the time of trial and all are still in business" (Pet. Br. 40).

The fact that the 20 percent tax confiscated virtually all of the profits of the respondents did not cause an immediate closing of their businesses. Respondents are obligated on long-term leases and have attempted to continue in business while seeking judicial relief. Moreover, as previously stated, the City of Pittsburgh, anticipating the results of this litigation, abandoned its tax on the gross receipts of the parking operators and imposed the tax directly on the parking patrons of both public and private facilities. See n.1, *supra*.

B. Respondents' Inability to Pass on the Tax

The City's assertion that the record contains no evidence of respondents' inability to pass on the tax is equally without merit (Pet. Br. 41 *et seq.*). First, the Pennsylvania Supreme Court, after noting that the Commonwealth Court

---

on the record, which apparently intermixed figures from three public parking authority garages with those of the private operators, thus distorting the entire calculation (A. 413a). In addition, the gross receipts figures suggested by the City Treasurer are erroneous (414a-415a). As the Commonwealth Court unanimously found, respondents lost $26,000 on gross revenues of over $7,700,000 in 1969 while paying $1.4 million in parking taxes and in 1970 respondents would sustain losses of $270,000 on gross revenues of over $8,000,000 while paying $1.6 million in parking taxes (P. 62a-63a).

(d) The claim that the comparative public and private rate study was misleading (Pet. Br. 38).

The City contends that Plaintiffs' Exhibit 7 (A. 600a, 89a) which contains comparative public authority and private rates is misleading. The City fails to note, however, that this detailed study was prepared by an independent expert *for its own Pittsburgh Parking Authority*. Plaintiffs' Exhibit 11, A. 614a *et seq.* at A. 633a.

unanimously found that the tax could not be passed on because of favored public competition (P. 16a, 23a), held that it was unnecessary for respondents to actually prove that they cannot pass the tax on to their customers. Justice Roberts reasoned as follows:

> "Not only is the Parking Authority able to charge lower rates than private operators, but with the enactment of the 20 percent gross receipts tax the taxing body now appropriates for itself practically all of the earnings of the private parking lot operators. By taking 20 percent of gross revenues 'off the top' the City effectively confiscates what were formerly the earnings of the parking lot owners. This confiscation is practically as complete as if the City had condemned without compensation the private lots to erect public facilities. In this situation it is unnecessary for private lot operators to prove that they cannot pass the tax on to their customers (although as previously noted the Commonwealth Court found this was not possible). See *Samuels*, supra; *Eglin*, supra. Clearly by raising their rates the private operators would greatly increase the already significant rate differential between private and public parking lots. The public competition thus effectively prohibits private lot operators from increasing their rates and passing the tax on to their patrons, while the imposed tax appropriates whatever earnings were formerly produced. Where such an unfair competitive advantage accrues generated, by the use of public funds, to a local government at the expense of private property owners, without just compensation, a clear constitutional violation has occurred." (P. 23a)[22]

22. As previously noted in footnote 4, *supra*, the Court of Common Pleas of Allegheny County, as well as the Commonwealth Court of Pennsylvania, have unanimously decided that the Pittsburgh Public Parking Authority is exempt from the 20% parking tax and all other taxes. *City of Pittsburgh* v. *Public Parking Authority*, —— Pa. Comm. Ct. ——, 314 A.2d 887 (1974), and authorities cited therein.

Second, the entire trial record is replete with uncontradicted evidence that the 20% tax could not be passed on to customers. For example, Peter Smith, Manager of the Meyers Brothers Chatham Center Garage, described the disastrous results of raising customers' parking rates on two prior occasions. In February, 1969, the parking tax rate rose from 10% to 15%. In an attempt to pass on this increase, Meyers Brothers' rates were raised as follows:

24 hour rate from $1.75 to $2.00
8-12 hour rate from $1.25 to $1.50.

Even this relatively minor increase in rates caused a decline in the number of cars using the parking facility (A. 239a), and eventually necessitated cutbacks in the cashier's and attendants' staff (A. 240a).

Again, in October, 1969, Meyers Brothers raised its rates to $2.25 for a 24-hour maximum and $1.75 for 8 to 12 hour parking. In this instance, business dropped off so sharply that four to five hundred parking spaces were left empty each day. Meyers Brothers was forced to lay off more personnel and to close off an entire floor of the garage (A. 241a-242a). Mr. Smith testified that when the tax rate was increased from 15% to 20%, another increase in parking rates would have resulted in Meyers having "no business whatsoever" (A. 242a-243a). In fact, Meyers Brothers was compelled to institute a lower "early bird" rate in order to draw back some of its former customers (A. 243a).

Respondents' inability to pass on the tax was further demonstrated by the privileged competitive position of the

City's Parking Authority.[23] In addition to the exemption from all taxes enjoyed by the Authority, the record repeatedly substantiates the findings of the Supreme Court of Pennsylvania that the Parking Authority's rates are pegged far below those of the private operators. For example, the all-day (10-hour) rate for seven private operations—the Stanwix Garage, the four Grant-Smithfield lots, the Oliver Plaza Garage and the Oliver Plaza lot, among

23. The City's claim that it is not responsible for the Pittsburgh Public Parking Authority (Pet. Br. 9) is utterly baseless. The Pittsburgh Parking Authority is obviously an arm of the City of Pittsburgh. First, its chairman and each of its board members, who establish rates for and control the operations of all Authority facilities, are appointed by the Mayor of the City and are directly responsible to his office. Parking Authority Law, *supra*, at 53 P.S. §348. Second, upon the termination of the existence of the Public Parking Authority, its properties will pass to the City of Pittsburgh. Parking Authority Law, *supra*, at 53 P.S. §354. Third, it is a matter of public record that from 1966 through 1970, inclusive, the City of Pittsburgh has derived revenues from the operation of the Public Parking Authority in the amount of $1,626,154.00. See Annual Report of the City Controller for Fiscal Year Ended December 31, 1966, at p. 30; 1967 at p. 30; 1968 at p. 36; 1969 at p. 36; 1970 at p. 37; all of which are public records on file in the offices of the City. Fourth, the debt of the Public Parking Authority is computed as a debt of the City for purposes of the total debt limitations of the City under the provisions of the Local Government Unit Debt Act, 1972, July 12, P.L. 185, §101, 53 P.S. §§11-202, 209.410. In fact, the only relevant factor pertaining to the Public Parking Authority which is not related directly to the operations of functions of the City of Pittsburgh is the legislative enactment by which the Authority could come into existence—at the sole option of the local government body. 53 P.S. §342. Finally, in its brief in *McGillick* v. *City of Pittsburgh, supra*, the City of Pittsburgh argued that the Authority was merely its alter ego and that to tax it would be to take money from one pocket and transfer it to the other. Brief for Defendant, p. 22, *McGillick* v. *City of Pittsburgh, supra*. This is precisely the finding of the Pennsylvania Supreme Court in the instant case:

> "Even if the Authority had to pay the tax to the City it would mean only in reality an accounting transaction, transferring dollars from one pocket of an instrumentality of City government to another." (P. 21a, n.9).

This construction of Pennsylvania law by its highest state court is controlling here.

others—was $3.00 in 1970 (A. 598a, 561a), while the rate for the same interval at three competing Public Parking Authority garages at Bigelow Boulevard, Third Avenue and Ninth Street, was only $2.00 (A. 537a).

The most thorough compilation of Public Parking Authority and private rates is contained in the June, 1970 report by national parking experts Wilber Smith & Associates, who were retained to make the study by the Public Parking Authority of Pittsburgh itself (Pl. Ex. 11, A. 614a). The report is reprinted in full at pages 614a through 686a of the Appendix. Table 3, reproduced at page 633a of the Appendix, clearly demonstrates the disparities between the rates charged by the Public Parking Authority and private operators:

"TABLE 3[24]

AVERAGE PARKING RATES

Interval	*Public Lots*[1]	*Public Garages*[2]	*Parking Authority Garages*[3]
1-Hour	$0.63	$0.70	$0.35
2-Hours	0.97	0.92	0.51
3-Hours	1.25	1.15	0.83
All-Day	1.97	2.11	1.73

(1) 20 public lots.
(2) Eight upblic garages.
(3) Eight Parking Authority garages."

The table establishes the fact that the short-term parking rates of the Parking Authority garages, which Donald M.

24. In this table, *respondents'* facilities are referred to as "public lots" and "public garages" as distinguished from the Parking Authority Garages.

McNeil, the leading parking expert in the City of Pittsburgh, testified is the critical factor for a "successful financial program" (A. 341a), are an average of one-half the private operators' rates, and that for any interval the Public Parking Authority substantially undercuts the rates of its private competitors (A. 632a-635a, 598a).[25]

---

25. Petitioner's contention (Pet. Br. 48) that it introduced evidence that the 20% tax could be passed on, because of the City's experience at its own wharf facility is baseless. First, the City is exempt from the 20% tax (A. 429a). Second, the City raised its all-day parking rate on its own small wharf lot from 75 cents to $1.50, after the City Treasurer concluded "this was too big of a bargain" (A. 427a). The City relies on the fact that there was little decrease in the number of customers using the City lot after the rate increase. This is hardly surprising, however, since the City's lot, even at its increased rate of $1.50 a day, was still a $1.00 cheaper than the rates charged in respondents' locations as well as those charged by its own Public Parking Authortiy (A. 427a-429a). Accordingly, the City's raising its absurdly low parking rate to a level still far below the rate charged by any other parking facility in Pittsburgh is meaningless.

The City also attempts to minimize the great disparity between public and private rates by citing a Parking Authority study which indicated a deficiency of 4,100 parking spaces in Pittsburgh (A. 616a). A full reading of this study indicates that the claimed shortage is an overall deficiency and does not purport to indicate the existence of deficiencies or surpluses in the downtown section at various times of the day.

Petitioner cites Table 4 of the study (A. 640a) to the effect that private facilities are 99.2% occupied at 2:00 p.m. on a typical week day and that all facilities, including Authority garages, are occupied 102.9% at that time. Petitioner fails to point out that the table demonstrates lesser occupancy at all other times of the day, that the total capacity of these garages ranges up to 120% because of the use of aisle space and that occupancy after 4 p.m. and on weekends is unreported. Most important, the City fails to make any mention of the main conclusion of this study: "The data show that the percentage of spaces occupied was about 10% higher throughout the day in the Authority garages than in other public facilities" (A. 638a). This finding directly supports respondents' contention regarding the disparity of rates.

Conclusion

For the foregoing reasons the decision of the Supreme Court of Pennsylvania should be affirmed.

March 23, 1974

LEONARD BOREMAN
RICHARD H. MARTIN
Attorneys for Respondents

LEONARD M. MARKS
ERIC BREGMAN
Special Counsel for Respondent Meyers Bros. Parking-Central Corporation

Of Counsel:

BASKIN, BOREMAN, WILNER, SACHS, GONDELMAN & CRAIG

GOLD, FARRELL & MARKS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-582

CITY OF PITTSBURGH,

Petitioner,

v.

ALCO PARKING CORPORATION, *et al.*,

Respondents.

ON CERTIORARI FROM THE
SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Now come the Council for Private Enterprise, American Consulting Engineers Council, American Society of Consulting Planners, American Society of Association Executives, Electronic Industries Association, Legislative Council for Photogrammetry, National Association of River and Harbor Contractors, National Council of Professional Services Firms, National Council of Technical Service Industries, National Employment Association, National Parking Association and Shipbuilders Council of America, and respectfully request that this Honorable

Court grant permission for the filing on their behalf of the brief *amicus curiae* accompanying this motion.

Petitioners are national organizations, all concerned with unfair competition by government at all levels. The specific interest of each organization is set forth in more detail in the brief accompanying this motion.

Because the petitioners are national organizations representing important segments of the private sector, they are in a position to discuss and document the significant implications of the issues in this case for the private enterprise system. A large number of the member firms of the associations participating in the filing of this brief *amicus curiae* experience direct competition from governmental entities. Petitioners are concerned that were the gross receipts tax imposed by the City of Pittsburgh to be upheld by this Court, there would be no restraint upon the power of government to tax its private sector competitors out of business. This tax, in our view, is so fundamentally unfair to private enterprise as to constitute a confiscatory taking under the Fifth and Fourteenth Amendments of the Constitution. Petitioners intend to present public policy and legal arguments in support of this conclusion.

Petitioners requested consent to the filing of a brief *amicus curiae* from all parties to this proceeding but consent was refused by the City of Pittsburgh.

JAMES S. HOSTETLER
PAUL S. McAULIFFE
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Of Counsel

GADSBY & HANNAH
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

March 22, 1974

TABLE OF CONTENTS

	Page
MOTION	i
THE INTEREST OF THE AMICI	2
SUMMARY OF ARGUMENT	11
ARGUMENT	17
I. COURTS ARE OBLIGED UNDER THE TAKINGS CLAUSE TO STRIKE DOWN CONFISCATORY TAXES	17
A. The Takings Clause Limits Abuse Of The Taxing Power	18
B. This Case Concerns A Particular Exercise Of The Taxing Power, Not The Basic Authority Of Government To Tax Or To Compete	21
C. A Selective And Excessive Tax Upon A Government's Direct Private Sector Competitors Requires Close Scrutiny	23
II. THE PUBLIC INTEREST IN PRESERVING A VIABLE SYSTEM OF PRIVATE ENTERPRISE REQUIRES JUDICIAL LIMITS ON THE GOVERNMENT'S EXERCISE OF SOVEREIGN POWERS TO GAIN AN UNFAIR COMPETITIVE ADVANTAGE	26
A. Government At All Levels Is Increasingly Engaged In Commercial-Industrial Activities In Direct Competition With Private Enterprise	26
B. Government Enterprise Activities Enjoy Numerous Inherent Competitive Advantages	29
C. Maximum Utilization Of The Resources Of The Private Sector Is In The Public Interest	32

Page

D. Public Policy Favors Restrictions Upon Unfair Government Competition With The Private Sector 35

1. The Pennsylvania Statute Authorizing Municipal Parking Authorities Specifically Prohibited Unfair Competition By Such Authorities 35

2. Federal Laws And Policies Limit Unfair Competition With The Private Sector By Government Instrumentalities 36

E. This Court Has Recognized The Need To Curb Adverse Competitive Impacts Flowing From Government Action 43

1. An Injured Competitor Has Standing To Challenge Government Action 43

2. Federal Antitrust Law Limits Adverse Competitive Impacts Deriving From Government Enterprise Activities 47

III. AN UNCONSTITUTIONAL TAKING OCCURS WHERE GOVERNMENT ENHANCES ITS COMPETITIVE POSITION BY LEVYING A TAX CAUSING SUBSTANTIAL ECONOMIC HARM TO ITS DIRECT PRIVATE SECTOR COMPETITORS 52

CONCLUSION 57

TABLE OF AUTHORITIES

Cases:

Alco Parking Corporation v. City of Pittsburgh, 453 Pa. 245, 307 A.2d 851 (1973) 12, 13, 25, 52

Alco Parking Corporation v. City of Pittsburgh, 6 Pa. Cmwlth. 433, 291 A.2d 556 (1972) 35, 56, 57

Page

Acker v. Commissioner of Internal Revenue, 258 F.2d 568 (6th Cir. 1958), *aff'd* 361 U.S. 87 (1959) 20

Air Reduction Company v. Hickel, 420 F.2d 592 (D.C. Cir. 1969) 45, 46

American Post. Wkrs. U., Detroit v. Independent Post. Sys. 481 F.2d 90 (6th Cir. 1973), *cert. granted* 94 S.Ct. 839 (1973) 46

Armstrong v. United States, 364 U.S. 40 (1960) 52, 53

Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970) 44, 45, 46

Barlow v. Collins, 397 U.S. 159 (1970) 45

Bowman v. Kansas City, 361 Mo. 14, 283 S.W.2d 26 (1950) 21

Brooks-Scanlon v. R.R. Comm'n, 251 U.S. 396 (1920) 53

California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972) 48

Chicago, B&Q R.R. v. Chicago, 166 U.S. 226 (1897) 17

City of New York v. United States, 337 F.Supp. 150 (E.D.N.Y. 1972) 53

City of Pittsburgh v. Public Parking Authority of Pittsburgh, No. 97 C.D. 1973 (Pa. Cmwlth. Jan 14, 1974) 24

Cole v. Richardson, 405 U.S. 676 (1972) 20

Continental Ore Company v. Union Carbide Corp., 370 U.S. 690 (1962) 48, 51

County of Allegheny v. Township of Moon, 436 Pa. 54, 258 A.2d 630 (1969) 30

Eastern Railroad President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 47, 48

Federal Maritime Comm'n v. Seatrain Ltd., 93 S.Ct. 1773 (1973) 47

Page

Federal Power Commission v. New England Power Co., 42 U.S.L.W. 4308 (U.S. March 4, 1974) 20

Gate City Garage v. Jacksonville, 66 So.2d 653 (Fla. 1953) 21

George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. den.* 400 U.S. 850 (1970) 49, 50, 51

Gulf States Utility Co., v. F.P.C., 93 S.Ct. 1870 (1973) 47

Hardin v. Kentucky Utilities, 390 U.S. 1 (1968) 44, 45

Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971) 51

In re New York, New Haven & Hartford Railroad Co., 330 F.Supp. 131 (D.Conn. 1971) 53

Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972) 51

Jayne v. City of Detroit, 348 U.S. 802 (1954) 21

Magnano Co. v. Hamilton, 292 U.S. 40 (1934) 25

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 15, 18, 19

McSorley v. Fitzgerald, 359 Pa. 264, 59 A.2d 142 (1948) 30

National Ass'n of Letter Car. v. Independent Postal System, 470 F.2d 265 (10th Cir. 1972) 46

National Board of Y.M.C.A. v. United States, 395 U.S. 85 (1969) 52

National Cable Television Association, Inc. v. United States, 42 U.S.L.W. 4306 (U.S. March 4, 1974) 20

New York v. United States, 326 U.S. 572 (1946) 30

Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958) 47

Page

Nuclear Data, Inc. v. Atomic Energy Comm'n, 344 F.Supp. 719 (D.Ill. 1972) 46

Ohio v. Helvering, 292 U.S. 360 (1934) 30

Otter Tail Power Company v. United States, 93 S.Ct. 1523 (1973) 47

Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218 (1928) 19, 20

Parker v. Brown, 317 U.S. 341 (1943) 47, 51

Philadelphia v. Eglin's Garage, 342 Pa. 142, 19 A.2d 845 (1941) 25

Philadelphia v. Samuels, 338 Pa. 321, 12 A.2d 79 (1940) 25

Puget Sound Power & Light Co. v. Seattle, 291 U.S. 619 (1934) 22, 44

Puget Sound Power & Light Co. v. Seattle, 172 Wash. 668, 21 P.2d 727 (1933) 22

Railroad Commission v. Eastern Texas R.R., 264 U.S. 79 (1924) 53

Rapid Transit Corp. v. New York, 303 U.S. 573 (1938) 23

Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) 46

Seattle Gas Company v. Seattle, 291 U.S. 638 (1934) 22

Seattle Gas Company v. Seattle, 172 Wash. 701, 21 P.2d 732 (1933) 22

South Carolina v. United States, 199 U.S. 457 (1905) 30

Swallow v. United States, 325 F.2d 97 (10th Cir. 1963), *cert. den.* 377 U.S. 951 (1964) 21

Tennessee Electric Power Co. v. T.V.A., 306 U.S. 118 (1939) 43, 44, 45

Page

United States v. Acker, 415 F.2d 328 (6th Cir. 1969), *cert. den.* 396 U.S. 1003, *reh. den.* 397 U.S. 958 (1970) 21

United States v. Keig, 334 F.2d 823 (7th Cir. 1964) 21

United States v. Sponenbarger, 308 U.S. 256 (1939) 52

Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869) 23

Woods Exploration and Producing Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. den.* 404 U.S. 1047 (1972) 51

Statutes:

Int. Rev. Code of 1954
- §103 31
- §115 30
- §511(a)(2)(B) 42
- § 511ff 41

15 U.S.C. §1ff 47

42 U.S.C. §4221ff 39

42 U.S.C. §4225 40

Act of October 20, 1951, ch. 521, 65 Stat. 452 42

Act of November 26, 1969, Pub. L. No. 91-129, 83 Stat. 269 40

Pennsylvania Statutes, Title 53 General Municipal Law
- §342(i) 36
- §344 25
- §346 31
- §348 25
- §349 31
- §354 25
- §355 ..... 30, 31

City of Pittsburgh Ordinance No. 704 of 1969 11

City of Pittsburgh Ordinance No. 30 of 1973 57

Page

Regulations:

Bureau of the Budget, Bulletin No. 55-4, Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use (January 15, 1955) 37

Bureau of the Budget, Bulletin No. 60-2, Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use (September 21, 1959) 37

Office of Management and Budget, Circular No. A-76, Policies for Acquiring Commercial or Industrial Products and Services for Government Use (Revised August 30, 1967) 38

Office of Management and Budget, Circular No. A-97, Rules and Regulations permitting Federal agencies to provide specialized or technical services to State and local units of government under Title III of the Intergovernmental Cooperation Act of 1968 (August 29, 1969) 40

Legislative Material:

S. 2510, 93d Cong., 2d Sess. (1974) 41

S. Rep. No. 93-692, 93d Cong., 2d Sess. (1974) 41

S. Rep. No. 2375, 81st Cong., 2d Sess., 1950-2 CUM. BULL. 483 (1950) 42

S. Rep. No. 781, 82d Cong., 1st Sess., 1951-2 CUM. BULL. 485 (1951) 42

H.R. Rep. No. 2319, 81st Cong., 2d Sess., 1950-2 CUM. BULL. 380 (1950) 42

STAFF OF SENATE COMM. ON GOVERNMENT OPERATIONS, 88th Cong., 1st Sess., GOVERNMENT COMPETITION WITH PRIVATE ENTERPRISE (Comm. Print 1963) 36

PA. LEG. JOURNAL 1947 36

Page

Studies, Reports, Miscellaneous:

BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1975 (1974) 27

COMMISSION ON GOVERNMENT PROCUREMENT, FINAL REPORT (1972) 40

Commission on Government Procurement, Study Group #1 (Utilization of Resources), Final Report (1972) 37

Comp.Gen.Rep. No. B-158685, *Better Controls Needed in Reviewing Selection of In-House or Contract Performance of Support Activities*, March 17, 1972 39

Comp.Gen.Rep. No. B-158685, *Better Management Needed in Civil Agencies Over Selection of In-House or Contract Performance of Support Activities*, July 31, 1973 39

ECONOMIC REPORT OF THE PRESIDENT, FEBRUARY 1974 (1974) 27

E. GINZBERG, D. HIESTAND, B. REUBENS, THE PLURALISTIC ECONOMY (1965) 29

Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165 (1967) 52

R. MUSGRAVE, THE THEORY OF PUBLIC FINANCE (1959) 31

NATIONAL LEAGUE OF CITIES, NATIONAL PARKING FACILITY REPORT (1972) 28, 30

Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV. L. REV. 847 (1968) 49

Note, *Colleges, Charities and the Revenue Act of 1950*, 60 YALE L.J. 850 (1951) 31

Page

Note, *Preventing the Operation of Untaxed Business by Tax-Exempt Organizations*, 32 U.CHI.L.REV. 581 (1965) 31

Note, *Takings and the Public Interest in Railroad Reorganization*, 82 YALE L.J. 1004 (1973) 53

Note, *The Macaroni Monopoly: The Developing Concept of the Unrelated Business Income of Exempt Organizations*, 81 HARV.L.REV. 1280 (1968) 31

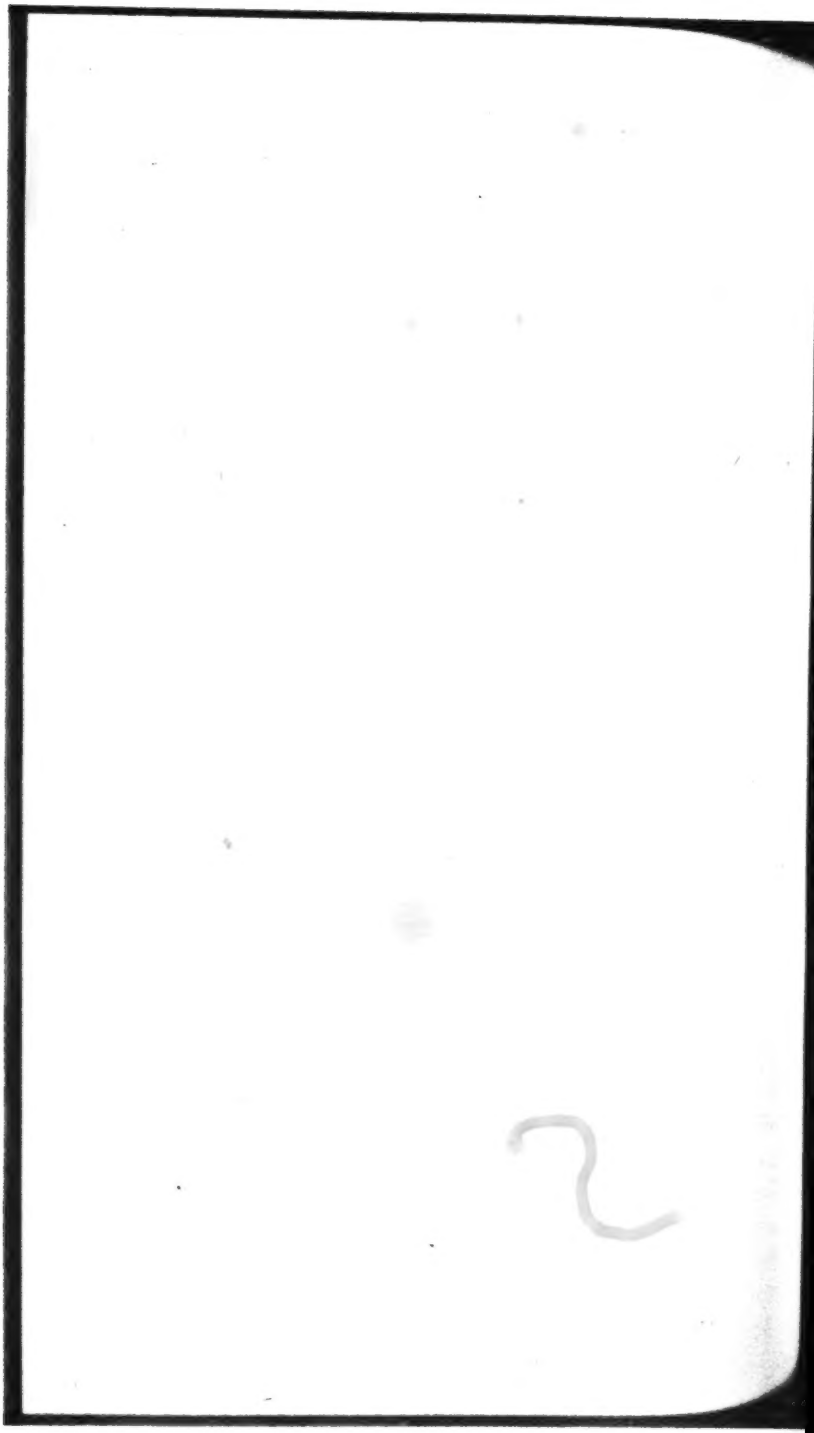
Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) 52, 54, 55

U.S. DEP'T OF COMMERCE, 1972 CENSUS OF GOVERNMENTS (1973) 27

U.S. Dep't of Commerce, OMB Circular A-76 Study, January 1972 39

M. WEIDENBAUM, THE MODERN PUBLIC SECTOR: NEW WAYS OF DOING THE GOVERNMENT'S BUSINESS (1969) 29

Wildermuth, *Contracting-Out: A Case for Realistic Contract vs. In-House Decision Making*, 49 MIL. L.REV. 1 (1970) 38



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-582

CITY OF PITTSBURGH,

Petitioner,

v.

ALCO PARKING CORPORATION, *et al.*,

Respondents.

ON CERTIORARI FROM THE
SUPREME COURT OF PENNSYLVANIA

BRIEF OF THE COUNCIL FOR PRIVATE ENTERPRISE, ET AL.

The Council for Private Enterprise and its constituent associations which have joined in this brief represent a broad spectrum of American industry engaged in a variety of industrial and commercial activities. In performing these activities the membership of each of these associations is confronted with significant direct competition from government and its instrumentalities. These associations and their individual members thus share a common interest in the development of laws and policies which restrain unfair competition between government and private enterprise. Amici are concerned that the

unreasonable gross receipts tax imposed by the City of Pittsburgh on private parking garages with which it is in direct competition would, if upheld by this Court, establish a precedent for similar abuse of sovereign powers by Federal, state or other local governmental entities acting in an enterprise capacity in direct competition with private sector firms.

THE INTEREST OF THE AMICI

The Council for Private Enterprise

The Council for Private Enterprise brings together numerous professional associations which have a common interest in strengthening private enterprise. The member firms of these associations engage in a broad range of industrial and commercial activities. Over the years, the private companies which are members of these associations have had substantial experience providing products and services in competition with government enterprise. The difficulties encountered in establishing the proper role for utilization of private sector capabilities have resulted in the Council for Private Enterprise defining the following specific objectives: 1) endeavoring to reduce or eliminate unjustified government incursions into commercial-industrial activities, 2) discouraging the initiation of new activities in areas where capabilities exist in the private sector, 3) informing the Congress, government agencies, and other interested parties of the extent and growth of such government activities in an effort to develop policies which will strengthen government reliance on private enterprise and assure appropriate limitations upon unfair government competition with the private sector.

The Council for Private Enterprise and its constituent associations believe that affirmance of the decision of the Supreme Court of Pennsylvania is necessary if unfair

government competition with the private sector is to be restrained.

American Consulting Engineers Council

The American Consulting Engineers Council, previously the Consulting Engineers Council of the United States, was founded in 1910 and consists of 2700 consulting engineering firms located in each of the fifty states. The Council was formed to assist its members in achieving higher professional, business and economic standards; to promote the professional and economic welfare of its members; to advise on enactment of legislation on a national basis affecting the interest of consulting engineers; to assist its members on state and local legislation that may have a relation to the general interest of the Council; and to provide general support and assistance in the advancement of the science and practice of engineering.

Private sector consulting engineering firms experience significant competition from in-house government staffs at all levels, both in providing engineering services for the government's own use and in providing services to the general public. The American Consulting Engineers Council has for several years sought reform in laws and policies to require maximum reliance on private sector capability in the engineering field and to minimize unfair government competition. This case has vital significance for the continued success of this effort.

American Society of Consulting Planners

The American Society of Consulting Planners was established in March 1966 in response to the particular needs of consulting planners. Currently, the membership includes 100 private sector consulting planning firms located in nearly every state in the United States. The consultant services provided by these firms include urban

planning, environmental planning, transportation planning, and the like.

The purpose of the Society is to advance the public welfare through the recognition and encouragement of the private practice of planning and to establish and enforce standards of technical and ethical performance in order to guide activity of firms which are engaged in such private planning.

Private sector consulting planners experience substantial direct competition from government at all levels, but particularly local, regional and state governments. In-house staffs frequently perform work for which there is adequate private sector capability; often these services are provided to other governmental units in direct competition with private sector firms. The Society and its members thus have an immediate interest in the formulation of legal rules to regulate such government competition.

American Society of Association Executives

The American Society of Association Executives is a nonprofit corporation founded in 1920 and incorporated in the District of Columbia. Its membership of 5000 individuals includes primarily full-time staff personnel engaged in the management of trade, professional, technical, educational, philanthropic or business associations.

A substantial number of the members represent industry associations which are directly concerned with limiting unfair government competition with private enterprise. The continued vitality of the industries represented by these associations requires judicial, legislative and administrative action to curb unfair competitive practices by government at all levels. This case therefore raises important legal and economic issues which affect all of these industries.

Electronic Industries Association

The Electronic Industries Association, originally founded in 1924 as the Radio Manufacturers Association, is the national industrial organization of electronic manufacturers in the United States. Its membership consists of approximately 280 electronic manufacturing firms.

The Association supports and strives to advance the defense of our country, the growth of our economy, the progress of technology, and all interests of the electronics industry compatible with the public welfare.

Under policy direction of its Board of Directors and operating through its various product groups, service departments, committees, and staff, the Association:

Stimulates public awareness of the vital role of the electronics industry in national defense, space exploration, communication, education and entertainment, the evolution of industrial technologies, the improvement of living standards, and the rise in the Gross National Product;

Coordinates and conveys the views of Association members to appropriate bodies on legislation and governmental regulations;

Cooperates with other associations of industry in areas of common interest to eliminate duplication of effort;

Promotes and stimulates our free enterprise system and vigorously supports our national policies for maintaining and preserving this system.

A substantial number of the members of EIA provide technical and support services in direct competition with government agencies. Competition with the private sector by government agencies has been a cause of grave concern for many years. During the past three decades the exigencies of the times have led to expansion of government in-house activities as well as mobilization of

industrial capability. Often these government activities were not cut back after the original need passed. These in-house commercial and industrial activities continue today without proper re-examination. Commercial organizations in industry thus find themselves competing with extensive Federal in-house activities.

Legislative Council for Photogrammetry

The Legislative Council for Photogrammetry is a national organization of 45 private firms practicing photogrammetric engineering. Organized in 1962, the Council is dedicated to promoting greater use of private firms to perform the necessary photogrammetric services required by the Federal, state and local governments. The membership experiences significant direct competition from government, in particular the U.S. Army Corps of Engineers and the U.S. Coast and Geodetic Survey. The Council thus has a direct interest in laws and policies which restrict unfair competitive actions by government and its instrumentalities.

National Association of River and Harbor Contractors

The National Association of River and Harbor Contractors was founded in 1937. Its 28 member firms provide engineering, dredging and other services both in this country and abroad. These services are provided in direct competition with such government agencies as the U.S. Coast Guard and the U.S. Army Corps of Engineers.

The objectives of the National Association of River and Harbor Contractors are to protect, promote, foster and advance the interest of its members by, *inter alia*, protecting the industry against unfair and unjust burdens. Unfair government competition, such as that presented in this case, is of direct concern to this industry. The

Association supports a ruling that would limit the ability of government to compete unfairly.

National Council of Professional Services Firms

The National Council of Professional Services Firms is an incorporated association formed in 1971 to seek reform of laws and policies which create unfair preferences for not-for-profit and in-house government sources in providing professional services to the government. The Council's membership includes seven associations representing particular segments of the professional services industry as well as over five hundred individual firms.

The professional services industry represented by the Professional Services Council consists of for-profit private sector firms engaged in research and development, testing, design and consulting work for clients in both the private and public sector. The industry today, about $11 billion in size and composed of over 11,000 firms, is one of the largest in the United States. It includes management consultants, systems analysts, computer software firms, testing laboratories, research and development firms and many specialty firms engaged in social studies, environmental studies, transportation studies, and other special study areas. Currently, approximately half of the industry's activity involves performing services for Federal, state and local governments; in addition, the industry in performing work for both the public and private sector faces direct competition from government instrumentalities providing similar services.

The professional services industry is concerned about the tendency of government at all levels to compete unfairly in performing professional services for which there is adequate available private sector capability. It is the view of the Council that laws and policies should require reliance on private sector firms to the extent such firms are qualified to perform work for government

agencies in order to achieve efficiencies in meeting governmental objectives, and that government instrumentalities providing professional services to the public should be required to compete on an equal basis.

National Council of Technical Service Industries

The National Council of Technical Service Industries (NCTSI) is a nonprofit association of major corporations which provide, by contract, a wide variety of support services required by government agencies in carrying out their assigned missions and programs. NCTSI was formed in 1965 to reverse a build-up of in-house government support service activities and to direct public attention to the failure of government agencies to implement the bipartisan national policy of reliance on private enterprise.

These support service activities total approximately $20 billion annually. They include a wide range of activities required by the Department of Defense, National Aeronautics and Space Administration, Department of Transportation, and several other agencies. Currently approximately $11.5 billion of this annual cost is performed in-house by Federal personnel and $8.5 billion is performed by private industry, including a significant portion performed by NCTSI members.

In our present economy, where more than sixty percent of the working force is engaged in service-type industries and where the private sector provides these services in a competitive environment, government should rely upon the private sector to supply its support service needs to the same extent that it now relies upon private industry to supply its product requirements. Despite a long-standing bipartisan expression of national policy that government rely upon the private sector to perform required services, that policy has not been effectively implemented. The trend, in fact, has been the reverse:

activities provided by contract with industry have in numerous instances been converted to in-house performance.

The National Council of Technical Service Industries is wholly dedicated to reversing this trend and maximizing government reliance upon industry for support service requirements.

National Employment Association

The National Employment Association was founded in 1960. Its membership includes corporations, companies, partnerships, and individuals engaged in providing employment services.

The objective of the Association is to create a better understanding, acquaintance, coordination and cooperation among employment services; to increase the efficiency of the agency service by the promotion of effective methods for serving employers and job applicants, by the consideration of the relations between employers and employees, and by the investigation and study of industrial and economic conditions; and to amply protect its members against all acts, methods and practices inimical to the best interests of the service.

Our membership is concerned with the tendency of government at all levels to build up unnecessary in-house civil service capability where adequate private sector capability is available.

National Parking Association

The National Parking Association is an incorporated association whose purpose is to promote the welfare and protect the interest of the commercial off-street parking industry. National Parking Association's membership consists principally of parking operators, parking consultants and suppliers to the parking industry.

The parking industry is handicapped by government competition at the municipal level. Municipal facilities are generally constructed with money borrowed under favorable conditions available only to government; they are usually free from the taxes levied against competing commercial facilities; because municipal facilities do not have to make a profit, they are generally operated at rates below economically feasible commercial rates; municipal facilities do not bear all normal costs of doing business: for example, in many cases bookkeeping may be a centralized municipal function, and snow removal is performed by the city. Such advantages as these make it difficult for private enterprise to compete on an equal basis.

Further, under the urban renewal program, the Federal government assumed a role in financing municipal parking by permitting a city to contribute a parking facility to a renewal project in lieu of the city's matching share of cash. Currently, general revenue sharing funds are being utilized to construct public parking facilities in some cities.

The National Parking Association and its membership thus have a direct interest in laws and policies which require government, where it competes with the private sector, to do so on an equitable basis.

Shipbuilders Council of America

The Shipbuilders Council of America is a voluntary, non-profit, unincorporated national trade association established originally in 1921 as the National Council of American Shipbuilders. The present name was adopted in 1943.

The purposes of the Council are (a) to inform its members of economic, governmental, industrial, legislative and judicial developments affecting the shipyard industry of the United States, either directly or indirect-

ly; (b) to promote the maintenance of a sound private shipbuilding and ship repair industry in the United States; and (c) to improve conditions under which the operations of the industry are carried on.

In pursuit of these objectives, the Council has for nearly four decades dealt with an ever-present problem of competition from government-owned and operated naval shipyards whose costs are demonstrably higher than costs in privately-owned, commercially-operated shipyards. National policy has reluctantly taken cognizance of this cost disparity, and, as a consequence, virtually all new naval ship construction is now placed with lower cost private yards. However, naval yards retain the majority of Navy ship repair, alteration and overhaul work for which there is adequate private enterprise capability which could perform these tasks more efficiently.

Summary of Argument

Since the briefs of the parties fully set forth the underlying facts and the course of the proceedings below, amici will not repeat them in detail here. Amici will instead highlight the extreme action which the City of Pittsburgh has taken in imposing a 20% gross receipts tax upon its direct competitors and the importance of establishing constitutional limits to such action under the Takings Clause.

At the time of suit the Public Parking Authority of the City of Pittsburgh ("Parking Authority") controlled approximately 25% of the off-street parking spaces in the downtown area of the city; the remaining 75% were owned and operated by private operators. City of Pittsburgh Ordinance No. 704 of 1969 (P.103a)[1] ("Park-

[1] Amici, for purposes of convenience, adopt the designations to the record used by the parties. Thus references designated by "P.___ a" are to the pages of the Appendix to the Petition for Certiorari filed by the City of Pittsburgh October 1, 1973.

ing Tax Ordinance") imposed a tax of 20% of gross receipts from parking transactions upon operators of commercial off-street parking facilities. This case, then, does not concern a revenue measure affecting the business community generally, but rather an inordinately high gross receipts tax selectively imposed by the City of Pittsburgh upon commercial garages with which the Parking Authority is in direct and substantial competition. The respondent parking garages have challenged the constitutionality of this tax, alleging *inter alia* that the excessive and unreasonable 20% rate, in view of the direct competition at lower rates from the Parking Authority, substantially eliminated the profitability of their parking garage business and would force the vast majority of commercial parking garage owners and operators in downtown Pittsburgh out of business. The court below held that under the circumstances the 20% tax constituted a confiscatory taking in violation of the Fourteenth Amendment to the United States Constitution.[2] In so holding the court placed great emphasis upon the impact of the direct, substantial and favored competition from the Parking Authority.

The issue before the court was not whether the 20% rate by itself was unconstitutional, but whether in view of the competitive circumstances the selective tax assessed by the City of Pittsburgh imposed such a substantial economic burden upon commercial parking facility operators that an unconstitutional taking had occurred. The court correctly phrased the issue presented as follows:

> This controversy presents the interesting and novel question whether the enactment, by a municipal government, of a 20 percent gross receipts tax upon all non-residential, commercial parking facilities in

---

[2] Alco Parking Corporation v. City of Pittsburgh, 453 Pa. 245, 307 A.2d 851 (1973).

> that municipality, combined with direct government competition in the form of a public parking authority, charging lower rates, has resulted in an unconstitutional taking and confiscation of private property without due process of law.[3]

The most significant factor considered by the court in finding a confiscatory taking was the fact that the City of Pittsburgh was acting in direct competition with private industry and enjoyed an extraordinary competitive advantage by reason of its tax exemptions and access to public financing and subsidies:

> Clearly the City of Pittsburgh is acting in an enterprise capacity by operating a publicly financed parking lot which competes with private industry. To the extent that the Public Parking Authority has gained an unfair competitive edge over private parking lot owners through tax exemptions and lower rates, and more importantly appropriated an unreasonable proportion of their revenues via the gross receipts tax, a taking requiring just compensation has occurred. In the absence of any compensation a taking without due process of law results.[4]

It is clear that this factor of favored and unfair government competition with private enterprise was critical to the decision of the court below, and that the same issue is before this court. As the court below noted:

> This government enterprise competing with private industry adds not only a new and most significant dimension to the traditional constitutional problem of what constitutes a taking without due process but also an impermissible one.[5]

---

[3] 307 A.2d at 853.

[4] 307 A.2d at 863, 864 n.14.

[5] 307 A.2d at 864.

This Court's resolution of the issues presented in this case will thus have a significant impact in the numerous areas of our economy where government and the private sector compete.

At the outset amici must take serious issue with the erroneous and misleading suggestion of the City of Pittsburgh that the decision below, if upheld, would destroy the ability of government to serve the public by requiring government either to forego levying taxes or providing services wherever government and the private sector compete. The decision below does not question the *authority* of the government to compete with private enterprise or to tax its competitors, but rather the exercise of the taxing power in this case. It merely limits the excessive and unreasonable tax selectively imposed by the City of Pittsburgh upon its private sector competitors.

The extreme tax imposed by the City of Pittsburgh constitutes arbitrary government action which must be restrained. The major role of the government in the economy makes the formulation of constitutional rules to assure fair treatment of all competitors of basic importance to the health of the United States economy. As the size of government at all levels has dramatically increased over the last several decades, competition between government and the private sector in the provision of goods and services has become a widespread phenomenon. This competition is not confined, as the City of Pittsburgh has suggested, to traditional public service activities but extends into numerous industrial, utility, distribution and service activities that have traditionally been performed by the private sector. The government competitor enjoys several inherent competitive advantages flowing from tax exemptions, low-cost public financing, direct and indirect subsidies, and various other attributes and privileges of the sovereign. Unre-

strained government competition would present a significant threat to the efficient use of private sector resources with ominous implications for the viability of the private enterprise system.

The importance of enforcing constitutional limits upon the legislature's exercise of the taxing power has been established since this Court's decision in *McCulloch v. Maryland*.[6] Courts are obliged under the Constitution to invalidate taxing measures so excessive and burdensome as to amount to a confiscatory taking. Where the tax upon a private sector firm is intertwined with the presence of direct, favored competition from the government, its adverse impact is substantially enhanced. This Court has been sensitive to the need to limit government action, such as that presented here, which adversely affects the competitive position of private firms. For example, the Supreme Court has rejected the prior doctrine that an aggrieved competitor *qua* competitor lacked standing to challenge government action which worked to its detriment. Similarly, efforts to induce anticompetitive actions by government acting in an enterprise capacity have been held subject to the antitrust laws, in recognition of the enormous economic impact of government commercial-industrial activities. It is thus appropriate, as the court below noted, for this same factor of government competition with private enterprise to require invalidation under the Takings Clause of an extreme tax selectively imposed upon a small group of private companies with which the taxing body was in substantial, direct and favored competition.

Construing the Takings Clause to prohibit this extreme tax is consistent with the original intent of the Clause as well as this Court's decisions applying the Takings Clause

---

[6] 17 U.S. (4 Wheat.) 316 (1819).

to specific government actions selectively imposing excessive burdens upon particular individuals or companies. This construction would further reflect a long-standing public policy to curtail unfair government competition with the private sector, a policy reflected most prominently in Federal laws and policies which seek to limit government commercial and industrial activity. This traditional public policy is expressed in the very Pennsylvania statute pursuant to which the Parking Authority has been created, which states in clear and unequivocal terms the objective of minimizing unfair government competition with the private sector.

Where government, acting in its sovereign capacity, levies a selective and excessive tax upon private sector firms with which it is in direct competition, strict judicial scrutiny is imperative. The instant case presents substantial involvement by a municipal authority in a commercial enterprise for which there is significant private sector capability; significant favoritism and privileges bestowed upon this authority, in the form of tax exemption, low-cost public financing, and the like, which permit it to undercut its private sector competitors; a devastating impact from the burdensome and selective tax upon direct competitors in the private sector; and the clear policy of the Pennsylvania legislature that public parking authorities should not compete unfairly. Were this Court to uphold this excessive and selective tax despite the demonstrated adverse impact on government's private sector competition, there would be no constitutional restraint upon the power of government at any level to expand its enterprise activity unfairly by taxing its private sector competitors out of business. Under the circumstances presented, therefore, this Court can draw but one conclusion: the Parking Tax Ordinance effects a confiscatory taking.

ARGUMENT

The Fifth Amendment to the Constitution of the United States reads in relevant part as follows:

> nor shall private property be taken for public use, without just compensation.[7]

In the instant case this Court should apply this fundamental constitutional limitation to invalidate the excessive and unreasonable gross receipts tax selectively imposed by the City of Pittsburgh upon its direct competitors in the private sector. For the reasons stated below, amici respectfully submit that this tax constitutes a confiscatory taking of the property of respondents in violation of their constitutional rights.

I.

COURTS ARE OBLIGED UNDER THE TAKINGS CLAUSE TO STRIKE DOWN CONFISCATORY TAXES

Before addressing this basic constitutional issue amici are compelled to clarify certain questions which the City of Pittsburgh has raised in an apparent effort to divert attention from the real issues in this case.

The City of Pittsburgh asserts that invalidation of the selective and burdensome gross receipts tax imposed by the City of Pittsburgh upon its direct competitors violates the proper separation of powers and is thus an inappropriate exercise of the power of judicial review vested by the Constitution in the Judicial Branch. It further suggests that the holding below somehow threatens to

---

[7]This provision is made applicable to the states and their instrumentalities by the Due Process Clause of the Fourteenth Amendment. Chicago B&Q R.R. v. Chicago, 166 U.S. 226 (1897). Throughout amici refer to this restraint upon the actions of the Federal and state governments and their instrumentalities as the Takings Clause.

"create a devastating crisis in the courts"[8] through creation of a radically new doctrine that exercise of the taxing power is subject to constitutional restraint. Each of these contentions is directly refuted by this Court's prior decisions.

A. The Takings Clause Limits Abuse of the Taxing Power

The doctrine that the legislature's exercise of powers of taxation is subject to this Court's interpretation of the Constitution has been well-established since the decision in *McCulloch v. Maryland*.[9] While petitioner quotes at length from the voluminous dicta in the *McCulloch* opinion, it fails to note that the state tax before the Court in that case was held unconstitutional. This decision firmly established the propriety of judicial invalidation of unconstitutional taxes levied by state governments and their instrumentalities; Chief Justice Marshall's discussion of this power of judicial review is directly pertinent here:

> . . . But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of the argument admit that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a matter of construction.

* * * * *

---

[8] Brief for Petitioner at 20.

[9] 17 U.S. (4 Wheat.) 316 (1819).

> If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of the instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states.[10]

Justice Holmes' dissenting opinion in *Panhandle Oil Co. v. Mississippi ex rel. Knox*[11] places those portions of the *McCulloch* opinion upon which petitioner seeks to rely in the context required by an intervening century of judicial construction of the Constitution:

> It seems to me that the state court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the states had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. *But this court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits. The power to fix rates is the power to destroy if unlimited, but this court while it endeavors to*

---

[10] 17 U.S. at 427, 431, 432.

[11] 277 U.S. 218 (1928).

prevent confiscation does not prevent the fixing of rates.[12]

This judicial authority to determine whether taxing measures, including rates of taxation, comport with the Takings Clause is well-recognized. *Acker v. Commissioner of Internal Revenue,*[13] for example, is one of numerous cases in which courts have considered claims that the rate of taxation imposed by the Federal income tax violates the Takings Clause. In *Acker,* the court in reliance upon the Holmes' dissent in *Panhandle Oil Co.* held that such a challenge to the progressive rate structure was properly

---

[12]277 U.S. at 223 (Emphasis added). *Compare* the opinion of Chief Justice Burger for the Court in Cole v. Richardson, 405 U.S. 676, 685, 686 (1972):

> Those who view the Massachusetts oath in terms of an endless "parade of horribles" would do well to bear in mind that many of the hazards of human existence that can be imagined are circumscribed by the classic observation of Mr. Justice Holmes, when confronted with the prophecy of dire consequences of certain judicial action, that it would not occur "while this Court sits". Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 223 (dissenting).

See also National Cable Television Association, Inc. v. United States, 42 U.S.L.W. 4306 (U.S. March 4, 1974), invalidating excessive charges imposed by the Federal Communications Commission upon private sector firms subject to its jurisdiction. The Court noted:

> Chief Justice Marshall is credited with the statement that "the power to tax is the power to destroy" (See Panhandle Oil Co. v. Knox, 277 U.S. 218, 223) to which Mr. Justice Holmes replied, "The power to tax is not the power to destroy while this Court sits." Ibid.

42 U.S.L.W. at 4307 n. 4.

See also Federal Power Commission v. New England Power Co., 42 U.S.L.W. 4308 (U.S. March 4, 1974).

[13]258 F.2d 568 (6th Cir. 1958), *aff'd* 361 U.S. 87 (1959).

before the court. *Swallow v. United States,*[14] *United States v. Keig,*[15] and *United States v. Acker*[16] are to the same effect.

Thus this Court's review of the Parking Tax to determine whether it effects a confiscatory taking is proper under, and in fact required by, the Constitution.

B. This Case Concerns a Particular Exercise of the Taxing Power, Not the Basic Authority of Government to Tax or to Compete

Petitioner has advanced a "parade of horribles" in arguing that the decision below "threatens to destroy the ability of government to serve the public."[17] This assertion reflects a fundamental misconception of the issues presented in this case and the nature of the specific government action involved.

Respondent parking garages do not contend that the Public Parking Authority of Pittsburgh somehow transgresses the Takings Clause by the mere act of engaging in competition with the private sector. Nevertheless petitioner attempts to buttress its argument with numerous citations to decisions holding that the Takings Clause does not establish a blanket prohibition against government competition with the private sector.[18] Each of these cases concerns a challenge to the *authority* of a public instrumentality to operate municipal garages in competi-

---

[14]325 F.2d 97 (10th Cir. 1963), *cert. den.* 377 U.S. 951 (1964).

[15]334 F.2d 823 (7th Cir. 1964).

[16]415 F.2d 328 (6th Cir. 1969), *cert. den.* 396 U.S. 1003, *reh. den.* 397 U.S. 958 (1970).

[17]Brief for Petitioner at 32.

[18]*See* Jayne v. City of Detroit, 348 U.S. 802 (1954); Gate City Garage v. Jacksonville, 66 So.2d 653 (Fla. 1953); Bowman v. Kansas City, 361 Mo. 14, 283 S.W.2d 26 (1950).

tion with private businesses; in none was the court called upon to evaluate the propriety of a selective tax aimed at its private competitors once government had commenced competition.

Similarly the City of Pittsburgh relies heavily upon *Puget Sound Power & Light Co. v. Seattle*[19] a decision which speaks solely to the propriety, under the Takings Clause, of *any* taxation of private businesses with which it competes. The petitioner in *Puget Sound* argued that the imposition of such a tax constituted a per se violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The Court characterized this argument as follows:

> As appellant asserts that the tax can impose no effective burden on the city, its contention is, in effect, that the city, by virtue of the Fourteenth Amendment, upon entering the business forfeited its power to tax any competitor.[20]

Accordingly *Puget Sound* upholds the constitutional authority of government to impose nonconfiscatory taxes upon its competitors. It is instructive that both *Puget Sound* and its companion case, *Seattle Gas Co. v. Seattle,*[21] arose upon a demurrer of the City of Seattle to the respective complaints.[22] Thus the court was not

---

[19]291 U.S. 619 (1934).

[20]291 U.S. at 623, 624.

[21]291 U.S. 638 (1934).

[22]The Supreme Court of Washington in its opinion thus addressed the question whether, under the circumstances, a municipality would be estopped from exercising its taxing power and concluded to the contrary. Puget Sound Power & Light Co. v. Seattle, 172 Wash. 668, 21 P.2d 727 (1933); Seattle Gas Co. v. Seattle, 172 Wash. 701, 21 P.2d 732 (1933).

presented with a factual record detailing the combined impact of government competition and the selective tax upon private sector competitors.[23]

While government competition may be permissible and taxation by government of its competitors may be permissible, no prior decision of this Court upholds an excessive tax selectively imposed by a government upon private sector firms with which it is in substantial, direct and favored competition. In reviewing the gross receipts tax imposed by the Parking Tax Ordinance in the context of favored competition at lower rates from the Public Parking Authority, therefore, this Court must address but one precise question: under what circumstances is a tax selectively imposed upon a government's direct competitors so arbitrary, unreasonable and burdensome as to constitute a compensable taking.

C. A Selective and Excessive Tax Upon a Government's Direct Private Sector Competitors Requires Close Scrutiny

Where direct competition between the government and private sector firms exists, and the government selectively

---

[23]Pittsburgh's reliance upon Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869) is misplaced for that case did not involve government competition with the private sector. The national banking associations which were favored by the tax in question were private corporations, not Federal instrumentalities. Veazie Bank is but one in a long line of cases establishing that a taxing authority may make reasonable distinctions among members of the private sector. In Veazie Bank the rational basis for distinction arose from the Federal interest in a uniform national currency, which provided an independent basis for upholding the tax in question. 75 U.S. (8 Wall.) at 548.

Rapid Transit Corp. v. New York, 303 U.S. 573 (1938), similarly confirms the propriety under the Equal Protection Clause of reasonable distinctions among private businesses in imposing tax burdens, and does not speak to the issue of unfair competition presented in the instant case.

imposes a heavy tax upon its private sector competitors, substantial questions as to the intent and effect of the government action are inevitably presented which require close judicial scrutiny. While the tax upon private sector firms may be an exercise of sovereign power, in the context of direct and favored government competition such a sovereign act may have the effect, whether intended or not, of substantially enhancing the unfair competitive advantages enjoyed by government acting in an enterprise capacity. This added factor of direct government competition thus requires a careful and thorough judicial inquiry into the particular circumstances and impact of a selective tax upon government's private sector competition; absent such scrutiny, government would be in a position to utilize its sovereign powers to unfair competitive advantage.

This case presents a particular set of circumstances which (unless the position espoused by the City of Pittsburgh were to be endorsed) lies at the extremes of government utilization of sovereign powers for unfair competitive advantage. The 20% gross receipts tax imposed by the City of Pittsburgh is not a revenue measure imposed upon the business community at large or upon the general public, but rather an assessment confined to one small and circumscribed group, commercial parking garage owners and operators within the City of Pittsburgh.[24] The Parking Authority is currently

[24]Technically, the tax was also imposed upon the Parking Authority. City of Pittsburgh v. Public Parking Authority of Pittsburgh, No. 97 C.D. 1973 (Pa. Cmwlth. Jan. 14, 1974) held, however, that the broad exemption from taxes enjoyed by the Parking Authority extends to the gross receipts tax. A petition for allowance of appeal from this ruling by the City of Pittsburgh is currently pending before the Supreme Court of Pennsylvania. It should be noted that the court below in the instant case did not rely upon such a tax exemption for the Authority, recognizing that "Even if the Authority had to pay the tax to the City it would

in direct competition with this group; by controlling 25% of the total spaces available in the downtown area it has achieved significant market power; and it has availed itself of numerous competitive advantages accruing solely by reason of its public enterprise status to charge rates substantially lower than the commercial garages.[25] The disastrous economic impact of this favored competition and the inordinately high tax drawing twenty cents of every dollar taken in by the private firm into the municipal treasury is well-documented.

The added factor of government competition with the private sector distinguishes *Magnano Co. v. Hamilton*[26], upon which petitioner bases much of its argument. The margarine industry impacted by the tax at issue in *Magnano* was not faced with competition from government. Where such competition exists, the ramifications of burdensome and selective tax measures are much more complex and present a far greater likelihood that a confiscatory taking of property may have occurred. The court below, in distinguishing its prior decisions in *Philadelphia v. Eglin's Garage*[27] and *Philadelphia v. Samuels*,[28] both decided several years before munici-

---

mean only in reality an accounting transaction, transferring dollars from one pocket of an instrumentality of city government to another." 307 A.2d at 861 n. 9.

[25]The Parking Authority was formed by a city ordinance (PA. STAT. ANN. Tit. 53 §344) and its entire Board is appointed by the Mayor (PA. STAT. ANN. Tit. 53 §348). The Parking Authority Law provides for transfer of all Authority assets to the city upon termination of existence (PA. STAT. ANN. Tit. 53 §354). The Supreme Court of Pennsylvania, construing state law, thus treated the Parking Authority and the City as one for purposes of this case. This construction of Pennsylvania law is controlling here.

[26]292 U.S. 40 (1934).

[27]342 Pa. 142, 19 A.2d 845 (1941).

[28]338 Pa. 321, 12 A.2d 79 (1940).

palities in Pennsylvania were even authorized to establish public parking authorities, quite properly recognized the significant implications of such direct government competition and the need for courts to scrutinize the particular circumstances and impact of the related exercise of the sovereign power to tax competing private sector firms.

II.

THE PUBLIC INTEREST IN PRESERVING A VIABLE SYSTEM OF PRIVATE ENTERPRISE REQUIRES JUDICIAL LIMITS ON THE GOVERNMENT'S EXERCISE OF SOVEREIGN POWERS TO GAIN AN UNFAIR COMPETITIVE ADVANTAGE.

The dramatic increase in government enterprise activities in direct competition with private sector firms is a major development with the most serious consequences for private enterprise. While the changing nature of the marketplace has significantly altered the position of private sector firms vis-a-vis their government competitors, few rules have been formulated to deal with this new reality. The need to enforce constitutional limits upon unfair government enterprise activity is thus one of overriding national importance. In the absence of such limits sovereign powers can be exercised to aid government enterprise unfairly at the direct expense of private sector competitors.

A. Government At All Levels Is Increasingly Engaged In Commercial-Industrial Activities In Direct Competition With Private Enterprise.

Federal, state and local governments, considered as a unit, constitute by far the most sizeable sector of our economy. In 1973 the combined expenditures by Federal, state and local governments were $448.5 billion

(Federal $264.7 billion, state and local $183.8 billion); measured against a total Gross National Product of $1,220.0 billion for 1973, government expenditures account for 37%. Federal purchases of goods and services together with the production of goods and services by in-house staffs alone totalled $106.9 billion for 1973, approximately 9% of G.N.P.[29]

The current importance of government as an economic unit reflects a significant expansion of government at all levels over the past three decades. Total government employment grew by 230% from 5.9 million to 13.6 million between 1942 and 1972. The growth of government has, contrary to common belief, been much more dramatic at the state and local than at the Federal level. During the 1942 to 1972 period, total employment at these levels expanded by 332%, from 3.3 million to 10.8 million.[30]

This significant expansion in government economic activity has a direct bearing on this case, for a substantial portion constitutes an increase in government enterprise activities carried on in direct competition with the private sector. Such activities take two forms. First, government directly provides a broad range of goods and services to the public. While much government activity in this field lies in such traditional areas of public service as education and police and fire protection, a substantial amount consists of commercial activities carried out in direct competition with private enterprise. Second, government provides numerous goods and services for its own use or for the use of other units of government; such goods and services are all too often provided by in-house govern-

[29] ECONOMIC REPORT OF THE PRESIDENT, FEBRUARY 1974 76, 80 (1974); BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1975 330 (1974).

[30] U.S. DEP'T OF COMMERCE, 1972 CENSUS OF GOVERNMENTS, VOL. 3 (1973).

ment staffs and facilities where adequate and more efficient private sector capability is readily available. The breadth of commercial and industrial activities undertaken by government in these two categories is enormous. The list includes such well-known activities as airports, public transit, parking garages, electric and gas utilities and sanitation. However, it also covers manufacturing (ship repair), construction (dams), wholesale and retail trade (including warehousing and distribution), professional services (e.g., data processing, research and development, planning and consulting services), communications and media activities (e.g., printing, photographic processing) and numerous personal services (e.g., janitorial, landscaping, food service).[31]

Government competition with the private sector is thus an ever-growing phenomenon within our mixed economy, the magnitude and implications of which are only now being appreciated. One commentator has summarized the dramatic change in the government's role in relation to private enterprise as follows:

> Nevertheless, the innovations in the forms of government enterprise during the past several decades have been so varied and pervasive that they almost represent a structural transformation. Under the impact of depression, war, cold war, breakthroughs in nuclear power and in the technology of space, together with the intensification of problems precipitated by industrialization and urbanization, government has been brought face to face with new and demanding problems requiring attention and

[31] The parking industry is illustrative of the significant expansion of government enterprise activities in competition with private enterprise. As of 1972, 6,464 cities operated municipal garages and lots, with a total investment of $5.2 billion. Over two-thirds of a billion dollars investment in facilities and control equipment over the next two years was contemplated. NATIONAL LEAGUE OF CITIES, NATIONAL PARKING FACILITY REPORT 24 (1972).

solution. As our history would have foretold, the response has been largely pragmatic. New departures have been made in enterprise forms as well as in their relations to private and nonprofit sectors, in Federal, state, and local governments. These innovations have resulted in an erosion of many conventional distinctions between the private enterprise and the governmental sector; they have led to the establishment of new joint forms of enterprises involving government and business, government and nonprofit organizations, and various levels of government; finally, they have resulted in a great proliferation of special-purpose public authorities or public corporations.[32]

As a consequence of this dramatic change, it is no longer appropriate to defer blindly to the sovereign when sovereign powers are used to gain an unfair advantage in the marketplace. Where government operates in the marketplace, the related exercise of sovereign powers must be subject to reasonable restraints.

B. Government Enterprise Activities Enjoy Numerous Inherent Competitive Advantages

The need for such restraints is magnified by the inherent competitive advantages over competing private sector firms which government acting in an enterprise capacity enjoys. The governmental entity is normally exempt from Federal and state income taxes; state and local real and personal property taxes; and in most instances excise and sales taxes imposed upon commercial products and services. It is financed through public funds, primarily derived from tax revenues and long-term,

---

[32]E. GINZBERG, D. HIESTAND, B. REUBENS, THE PLURALISTIC ECONOMY 34, 35 (1965). *See also* M. WEIDENBAUM, THE MODERN PUBLIC SECTOR: NEW WAYS OF DOING THE GOVERNMENT'S BUSINESS (1969).

low-interest, tax-exempt government financing.[33] In many cases it is eligible for and receives substantial subsidies from a higher level of government. Finally, the government enterprise enjoys numerous other privileges which inhere in the sovereign, such as eminent domain, and is frequently exempt from regulatory requirements imposed upon competing private businesses.

The present case provides a typical illustration of government's competitive advantages. Under the Parking Authority Law enacted by Pennsylvania, all parking authorities within the state are exempt from real and personal property taxes and excise taxes.[34] An exemption from Federal income taxes is provided in §115 of the Internal Revenue Code.[35] Parking authorities are author-

---

[33]Revenue from on-street parking meters is another significant source of public funding in the case of municipal parking facilities. In 1972 approximately $135 million (54%) of the $250 million in municipal revenues from parking meters was deposited in special parking funds rather than the general municipal treasury. Such parking funds provide an earmarked source of funds for municipal parking facilities. NATIONAL LEAGUE OF CITIES, NATIONAL PARKING FACILITY REPORT 30 (1972).

[34]PA. STAT. ANN. Tit. 53 §355 (1954); McSorley v. Fitzgerald, 359 Pa. 264, 59 A.2d 142 (1948); County of Allegheny v. Township of Moon, 436 Pa. 54, 258 A.2d 630 (1969).

[35]INT. REV. CODE OF 1954, §115. Amici note that such an exemption from Federal taxes is not constitutionally required where a government carries on commercial-industrial activities in competition with the private sector. *See* New York v. United States, 326 U.S. 572, 582 (1946):

> But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls only on a State.

See also South Carolina v. United States, 199 U.S. 457 (1905); Ohio v. Helvering, 292 U.S. 360 (1934).

ized to issue bonds of up to forty year maturity, the income from which is exempt from all Pennsylvania taxes and from Federal income taxes.[36] The power of eminent domain is also specifically conferred.[37] As the court below noted, the two factors of tax exemption and low-cost public financing by themselves constitute an unfair competitive advantage.

The favors bestowed upon government enterprise lend it considerably greater flexibility than its private sector counterpart in responding to a business environment in which both must operate. This flexibility creates an enormous potential for anticompetitive and monopolistic actions by government instrumentalities.[38] For example, a government enterprise may take advantage of its privileges to engage in unfair price competition with destructive consequences to its private sector competitors. Having eliminated viable private sector competition, the government enterprise would then become a traditional monopolist. On the other hand, the government firm may choose to maintain competitive price levels and enjoy a large margin of extra profits. Its tax exemptions and other competitive advantages then constitute a subsidy which can be used for specific long-term

---

[36]PA. STAT. ANN. Tit. 53 §346, 355; INT. REV. CODE OF 1954, §103.

[37]PA. STAT. ANN. Tit. 53 §349.

[38]There has been considerable analysis of the same fundamental unfairness and adverse economic implications presented here in the closely analogous context of tax-exemptions for charitable organizations engaged in commercial activities. *See* Note, *The Macaroni Monopoly: The Developing Concept of the Unrelated Business Income of Exempt Organization*, 81 HARV. L. REV. 1280 (1968); Note, *Preventing the Operation of Untaxed Business by Tax-Exempt Organizations*, 32 U. CHI. L. REV. 581 (1965); Note, *College Charities, and the Revenue Act of 1950*, 60 YALE L.J. 850 (1951). *See also* R. MUSGRAVE, THE THEORY OF PUBLIC FINANCE 276-286 (1959).

competitive purposes, such as investment in improved physical plant and capital facilities. The eventual adverse impact on competition would be the same.

The instant case illustrates the significant threats to private enterprise posed by the proliferation of government enterprise activities enjoying significant competitive advantages over private business and the need for laws and policies, effectively implemented, which curb government competition with the private sector on an unfair and inequitable basis. The combination of practical limitations upon increasing revenues from such traditional sources of revenue as property taxes and the inherent tendency of an organization, public or private, to seek to expand its operations inevitably moves public enterprise into destructive competition with the private sector. As in the instant case, the legislature which initially authorized this activity never intended such consequences; nevertheless the momentum towards expansion, fueled by unfair competitive advantages and the need for additional government revenues, threatens to eliminate any viable private sector competition. In such circumstances, where the combined impact of government competition and the related exercise of sovereign powers can cause substantial economic harm to competing private sector firms, it is essential that the limitations on arbitrary government action established by the Takings Clause be enforced.

C. Maximum Utilization Of The Resources Of The Private Sector Is In The Public Interest

The principles governing the private enterprise system as we know it in the United States and which have made the United States economy so successful remain valid. The basic principle underlying reliance upon private enterprise is the recognition that the profit motive and

competition in business provide efficiencies which cannot be duplicated readily in the public sector. Private enterprise is the economic system which embodies the greatest promise for providing the general public in the long run with the maximum social and economic benefits. The proper role of government, if the capabilities of our economic system are to be developed to the fullest, is to safeguard the operations of the market and to regulate economic activities where competition is not perfect or is absent or where the market does not adequately account for the value of certain public objectives. It is clearly not the proper role of such a government in conducting its own activities and providing necessary public services to engage in unfair competition with private organizations providing similar services; on the contrary, the government should carry out these activities with a view towards encouraging development of the capabilities of the private sector.

It is well understood that government enterprise creates significant distortions within our tax structure. Since government enterprise is funded through tax dollars, private taxpaying businesses are in effect required to finance their own competition. This is an unintended and fundamentally unfair result. In addition, the expansion by one unit of government into commercial-industrial activities to the detriment of the private sector deprives other levels of government of urgently needed revenues. For example, when a commercial facility is owned by a local government, such property escapes the payment of local taxes, its income is normally exempt from Federal and state income taxes, and its products and services frequently escape excise and similar taxes normally levied on a commercial product. This significant overall revenue loss from government enterprise activities is a cost eventually imposed on taxpayers at all levels of government through higher general tax rates.

The overriding importance of curbing unfair government competition with private enterprise lends broad implications to the specific questions presented in this case. The dissenting justices in the Commonwealth Court, whose position was upheld by the Supreme Court of Pennsylvania, recognized the need to invalidate this excessive and unreasonable tax upon a direct private sector competitor if our national policy of reliance on private enterprise is to have any meaning; otherwise, the ability of government to unfairly compete would be virtually unlimited:

> Under our free enterprise capitalistic system, the government was never intended to enter into competitive private businesses, except as may be justified under its police powers. When this Commonwealth instituted the authority approach to public services, it was never intended as an intentional and direct method of governmental competition with its citizens. Rather, it was intended as a means to circumvent the constitutional limitations on governmental indebtedness, where certain public services were in need of capital investment not otherwise available or provided by private citizens or businesses. Except for matters purely within a governmental function, government should not provide capital and labor to compete with its citizens. To some, who believe in some form of government other than that which we enjoy, the government should take over all businesses affecting the public interest. To them, in Pennsylvania, it would be appropriate for government to take over the steel mills and use government employees to run them, much like that which was done with the retail sale of liquor. Such a philosophical approach does violence to my understanding of our present system of government. Therefore I believe *great caution should be taken to make certain that a competing government does not force the private businesses of*

our citizens out of existence by an arbitrary use of otherwise unrestricted taxing powers.[39]

D. Public Policy Favors Restrictions Upon Unfair Government Competition With the Private Sector

Resolution of the specific issues in this case therefore raises fundamental questions concerning the proper role of government and its instrumentalities as participants in our free enterprise economic system. Government policy makers who have addressed these same issues in other contexts have consistently sought to strike a balance between the public and private sectors which assures reliance upon the private sector to the maximum feasible extent. Were this Court to reverse the decision below and sanction the actions which the City of Pittsburgh has directed at its private sector competitors, it would contravene this important and well-recognized public policy.

1. The Pennsylvania Statute Authorizing Municipal Parking Authorities Specifically Prohibited Unfair Competition by Such Authorities

It is clear that the Pennsylvania legislature, in authorizing municipalities to form parking authorities, never intended that such municipal parking facilities compete to the detriment of private enterprise. The Parking Authority Law specifically provides:

> That it is intended that the authority cooperate with all existing parking facilities so that private enterprise and government may mutually provide

---

[39] Alco Parking Corporation v. City of Pittsburgh, 6 Pa. Cmwlth. 433, 449, 450, 291 A.2d 556, 565 (1972) (dissenting) (Emphasis added).

> adequate parking services for the convenience of the public.[40]

During the debates on this measure in the House, Representative Richter, one of the co-sponsors, elaborated upon this intent:

> . . . I do not believe that parking should become strictly a public operation. There are people in private enterprise there now and I believe that they should be permitted to remain there and the government should not take over their facilities and drive them out of business.[41]

This clear intent was violated by the expansion of municipal parking facilities in downtown Pittsburgh with substantial unfair competitive advantages which have worked to the detriment of competing private garages. This same legislative policy magnifies the arbitrary and capricious nature of the selective tax which enhances these unfair competitive advantages.

2. Federal Laws And Policies Limit Unfair Competition With the Private Sector by Government Instrumentalities

Beginning with an extensive study made in 1932 by a Special Committee of the House of Representatives, Congress has addressed the problem of unfair government competition and affirmed the need to curtail such competition in numerous hearings and reports over the last forty years.[42]

---

[40]PA. STAT. ANN. Tit. 53, §342(i) (1954).

[41]PA. LEG. JOURNAL 1947, 2094 (House).

[42]The earlier Congressional activity is discussed at length in STAFF OF SENATE COMM. ON GOVERNMENT OPERATIONS, 88TH cong., 1ST sess., GOVERNMENT COMPETITION WITH PRIVATE ENTERPRISE (Comm. Print 1963). Since 1963 there

Much of this concern has focused upon the inadequate utilization of private sector capabilities to provide goods and services for the government's own use. A number of legislative proposals addressing this problem have been deferred in favor of oversight of the ongoing efforts of the Executive Branch to implement a policy of maximum reliance on private enterprise administratively and to fashion fair rules to govern this policy of reliance.

More specifically, in January 1955, the Bureau of the Budget published the first of a series of Bulletins stating a policy of maximum reliance upon private enterprise to provide the government's needs for goods and services. Bureau of Budget Bulletin No. 55-4[43] stated:

> It is the general policy of the administration that the Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be produced from private enterprise through ordinary business channels. Exceptions to this policy shall be made by the head of an agency only where it is not in the public interest to procure such product or service from private enterprise.

Bureau of Budget Bulletin No. 60-2[44] represented a further strengthening of this policy of reliance upon the private sector:

---

has been substantial additional Congressional activity which is summarized in Commission on Government Procurement, Study Group # 1 (Utilization of Resources), Final Report, Vol. II (1972).

[43]Bureau of the Budget, Bulletin No. 55-4, Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use, para. 2 (January 15, 1955).

[44]Bureau of the Budget, Bulletin No. 60-2, Commercial-Industrial Activities of the Government Providing Products or Services for Governmental Use, para. 2, 3 (September 21, 1959).

> It is the general policy of the administration that the Federal Government will not start or carry on any commercial-industrial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels.

The rationale for this policy was clearly stated:

> Because the private enterprise system is basic to the American economy, the general policy establishes a presumption in favor of government procurement from commercial sources. This has the twofold benefit of furthering the free enterprise system and permitting agencies to concentrate their efforts on their primary objectives.

In stating such a firm policy and narrowly defining those exceptions which would permit in-house performance, this Bulletin sought to articulate a balance between public and private sector activity which so far as possible reserved to the private sector those functions which it could more appropriately perform. This same effort to strike an appropriate balance is reflected in the most current expression of Executive Branch policy, Office of Management and Budget Circular No. A-76,[45] which again establishes specific guidelines:

> in furtherance of the Government's general policy of relying on the private enterprise system to supply its needs.[46]

---

[45]Office of Management and Budget, Circular No. A-76, Policies for Acquiring Commercial or Industrial Products and Services for Government Use, para. 2 (Revised August 30, 1967).

[46]The evolution of this policy and several specific examples of its application are set forth more fully in Wildermuth, *Contracting Out: A Case for Realistic Contract vs. In-House Decision-Making*, 59 MIL.L.REV. 1 (1970). Inevitably there have been difficulties in the precise application of this general objective to specific situations, bureaucratic recalcitrance to take action which would restrain the expansion of the bureaucracy, and resistance from

In 1968, the Congress gave specific statutory recognition to this policy of reliance on private enterprise in Title III of the Intergovernmental Cooperation Act of 1968[47] which authorized Federal agencies to provide certain technical services to state and local governments. Because many private sector firms are engaged in providing such services to state and local governments, such authorization threatened an increase in unfair government competition with private sector firms. Congress forestalled such a development by specifically limiting any such Federal activity to areas where there was special competence within the Federal government and an absence of adequate private sector capability; in doing so it stated a basic policy of reliance upon private enterprise:

> Provided, however, that such services shall include only those which the Director of the Office of Management and Budget through rules and regulations determines Federal departments and agencies have special competence to provide. Such rules and regulations shall be consistent with and in furtherance of *the Government's policy of relying on the private enterprise system to provide those services*

---

unions of government employees who view the issue from the narrow perspective of job security rather than from the over-riding national interest in maximum reliance upon the competitive private sector. *See* Comp. Gen. Rep. No. B-158685, *Better Controls Needed in Reviewing Selection of In-House or Contract Performance of Support Activities*, March 17, 1972; Comp. Gen. Rep. No. B-158685, *Better Management Needed in Civil Agencies Over Selection of In-House or Contract Performance of Support Activities*, July 31, 1973; U.S. Dep't of Commerce, OMB Circular A-76 Study, January 1972. Nevertheless the continuing efforts of the Executive Branch during every Administration for the last twenty years reflect the fundamental importance attached to this national policy.

[47] 42 U.S.C. §4221 ff (1970 ed.).

which are reasonably and expeditiously available through ordinary business channels.[48]

In 1969 Congress created a Commission on Government Procurement to review government procurement laws and policies. In establishing this Commission, Congress declared its policy "to promote economy, efficiency and effectiveness in the procurement of goods, services and facilities by and for the Executive Branch of the Federal Government by:

> minimizing possible disruptive effects of Government procurement on particular industries, areas, or occupations;
>
> * * *
>
> promoting fair dealing and equitable relationships among the parties in Government contracting.[49]

The Commission's report to Congress, issued December 1972, reviews the Government's policy of reliance on private enterprise and the lengthy history of Congressional and Executive Branch efforts to develop and implement an effective "make-or-buy" policy. It recommends that there should be an even clearer expression in the law of the Government's policy for relying on the private sector for goods and services.[50] In the current

---

[48] 42 U.S.C. §4225 (1970 ed.) (Emphasis added). The pertinent regulations are set forth in Office of Management and Budget, Circular No. A-97, Rules and Regulations permitting Federal agencies to provide specialized or technical services to State and local units of government under Title III of the Intergovernmental Cooperation Act of 1968 (August 29, 1969), which establishes a condition that the requesting government "certify that such services cannot be procured reasonably and expeditiously by it through ordinary business channels."

[49] Act of November 26, 1969, Pub.L. No. 91-129, §§1(9), 1(11), 83 Stat. 269.

[50] COMMISSION ON GOVERNMENT PROCUREMENT, FINAL REPORT, VOL. I 57 (1972) (Recommendation 22).

Congress, concern for elaboration and further development of this fundamental policy continues. For example, a bill recently passed by the Senate would establish an Office of Federal Procurement Policy, whose responsibilities include:

> monitoring and revising as necessary policies and regulations concerning the role of the Federal Government and its reliance on the private sector in providing goods and services required to meet public needs.[51]

The stated objective for conferring this power is that:

> Giving the OFPP the function of monitoring and revising, as necessary, executive directives implementing this national policy will enhance its observance and assure more positive implementation.[52]

Congressional concern for limiting unfair competition is evident in other areas. Similar problems of unfair competition are presented where a tax-exempt not-for-profit organization engages in commercial or industrial activities in competition with private sector firms. Congress has sought to eliminate this unfair competition by requiring the not-for-profit organization to pay taxes upon net income from such "unrelated business" activity.[53] The rationale of this tax on unrelated business income has been explained as follows:

> The problem at which the tax on unrelated business income is directed is primarily that of unfair competition. The tax-free status of these . . . organizations enables them to use their profits tax-free to expand operations, while their competitors can

---

[51] S. 2510, 93rd Cong., 2d Sess. §6(c)(1)(1974).

[52] S.Rep. No. 93-692, 93d Cong., 2d Sess. 19 (1974).

[53] INT. REV. CODE OF 1954, §§511ff

expand only with their profits remaining after taxes.[54]

Significantly, Congress in the Revenue Act of 1951[55] specifically expanded this tax to cover unfair competition by publicly-supported educational institutions:

> . . . the present provision does not apply to such income of State universities and other schools of governmental units. It has been called to the attention of your committee that some State schools are engaging in unrelated activities and "lease-backs" which would be taxable if they were not a State or its instrumentality. *It is clear that the same opportunities for unfair competitive advantage exist* in connection with these activities of State universities as with respect to similar activities of other educational institutions.[56]

This Congressional and Executive Branch activity represents an ongoing effort to implement laws and policies which limit unfair government competition with the private sector. This effort proceeds from a basic premise that, within our free enterprise economic system, it is not appropriate for a government instrumentality to compete unfairly in providing products or services where adequate private sector capability exists. This same fundamental policy is directly relevant to this Court's interpretation and application of pertinent constitutional restraints upon government action.

---

[54]H.R. Rep. No. 2319, 81st Cong., 2d Sess., 1950-2 CUM.BULL. 380, 409 (1950); *See also* S.Rep. No. 2375, 81st Cong., 2d Sess., 1950-2 CUM.BULL. 483, 505 (1950).

[55]Act of October 20, 1951, ch. 521, §339, 65 Stat. 452, *codified at* INT. REV. CODE OF 1954, §511(a)(2)(B).

[56]S.Rep. No. 781, 82nd Cong., 1st Sess., 1951-2 CUM.BULL. 458, 578 (1951) (Emphasis added).

E. This Court Has Recognized the Need to Curb Adverse Competitive Impacts Flowing From Government Action

Recent decisions of this Court and of the lower Federal courts concerning the standing of a competitor to challenge government action which adversely affects its competitive posture and the application of the antitrust laws to certain commercial activities in which the government is a participant recognize the need for courts to scrutinize and curtail government actions with an adverse impact upon competition. The instant case presents such government action, and the competitive effects of that action must, as the court below recognized, be taken into account in determining whether an unconstitutional taking has occurred.

1. An Injured Competitor Has Standing to Challenge Government Action

This Court, by enabling a competitor more readily to challenge governmental action which works to its competitive detriment, has established the important responsibility of the judiciary to assess the adverse competitive impacts of government action.

The expanded judicial role in this area is aptly illustrated by a comparison of two decisions of this Court concerning the paradigm of government enterprise activity, the Tennessee Valley Authority. *Tennessee Electric Power Co. v. T. V. A.*[57] is typical of numerous rulings of an earlier era which took a narrow view of the judicial function. In *Tennessee Electric Power* several private electric power companies operating within the geographic area to be served by the Tennessee Valley Authority's electricity generation and distribution facili-

[57] 306 U.S. 118 (1939).

ties brough suit to enjoin these operations, claiming that the Act creating the Authority was unconstitutional. Although the Court recognized that the T.V.A. would be "in direct competition with the appellants' enterprises through the sale of power to industries in areas now served by them or which they can serve by expansion of their facilities,"[58] it held that these private sector competitors had no standing to maintain the action.[59]

Thirty years later, in *Hardin v. Kentucky Utilities*,[60] this Court reached the opposite conclusion in factual circumstances substantially similar to those presented in *Tennessee Electric Power*. Kentucky Utilities Company brought suit to enjoin an expansion of the T.V.A. service area into a locale formerly served primarily by Kentucky Utilities. This Court rejected the argument, based upon the earlier decision in *Tennessee Electric Power*, that Kentucky Utilities lacked standing, distinguishing that prior decision on the basis of intervening Congressional action reflecting a clear intent to protect private utility companies from unfair T.V.A. competition.[61] Thus a private sector firm alleging injury from the unfair and illegal competition of a government instrumentality was held entitled to judicial review of the legality of that competition.

Subsequently, in *Association of Data Processing Service Organizations v. Camp*,[62] this Court specifically

---

[58]306 U.S. at 137.

[59]Significantly this decision relied in part upon Puget Sound Power and Light Co. v. Seattle, 291 U.S. 619 (1934), which petitioner City of Pittsburgh has advanced as the primary authority for disregarding the effects of government competition. *See* 306 U.S. at 139 n. 9; Brief for Petitioner at 31.

[60]390 U.S. 1 (1968).

[61]390 U.S. at 5, 7.

[62]397 U.S. 150 (1970).

rejected the standards established by *Tennessee Electric Power* in favor of a more liberalized test of standing. *Data Processing* involved a suit by a national organization of data processing service organizations and several individual data processing firms challenging a ruling by the Comptroller of the Currency permitting national banks to provide data processing services to other banks and to bank customers in competition with the petitioners. In holding that this potential injury to the competitive position of the data processing service organizations constituted a basis for challenging the Comptroller's action, this decision significantly expanded the circumstances in which a competitor may challenge government action and correspondingly endorsed increased involvement of the judiciary in assessing the impact of government action upon competition.[63]

One significant effect of this Court's liberalization of the standing doctrine is to require judicial review of a broad range of government actions which enhance unfair government competition with private enterprise. *See Hardin v. Kentucky Utilities.*[64] For example, in *Air Reduction Company v. Hickel*[65] several private sector producers and distributors of helium brought suit to enjoin enforcement of Interior Department regulations which barred them from selling helium to any government contractor. Under the regulations government contractors were permitted to purchase their requirements of helium solely from the Interior Department's helium program, which operated in competition with these private sector firms. The court held that these private sector competitors had the requisite standing since the regulations "would interfere with appellant's

[63] *See also* the companion decision in Barlow v. Collins, 397 U.S. 159 (1970).

[64] 390 U.S. 1 (1968).

[65] 420 F.2d 592 (D.C.Cir. 1969).

existing beneficial business relations with Government contractors"[66] and further held the regulations invalid as exceeding the authority conferred upon the Secretary. In addition to such scrutiny of direct government competition Federal courts, under the *Data Processing* doctrine, are now in a position to review the competitive impact of such actions as disposition of government property, *Nuclear Data, Inc. v. Atomic Energy Comm'n*,[67] (grant of exclusive patent rights), and of government procurement, *Scanwell Laboratories, Inc. v. Shaffer*.[68] Similarly complaints by unions of government employees concerning competition from the private sector have been entertained. *National Ass'n of Letter Car. v. Independent Postal System*.[69]

The common thread of these decisions is a recognition of the important role performed by the judiciary in protecting private sector firms from the adverse competitive impact of government actions. Collectively they constitute an overwhelming rejection of petitioner City of Pittsburgh's contention that such a judicial role "threatens to destroy the ability of government to serve the public."[70]

---

[66]420 F.2d at 594.

[67]344 F.Supp. 719 (D.Ill. 1972).

[68]424 F.2d 859 (D.C. Cir. 1970).

[69]470 F.2d 265 (10 Cir. 1972). This specific issue is currently before the court in American Post. Wkrs. U., Detroit v. Independent Post. Sys., 481 F.2d 90 (6 Cir. 1973), *cert. granted* 94 S.Ct. 839 (1973).

[70]Brief for Petitioner at 32.

2. *Federal Antitrust Law Limits Adverse Competitive Impacts Deriving From Government Enterprise Activities*

This court, in *Parker v. Brown*[71], held as a matter of statutory construction that certain government regulatory activities were not subject to the Sherman Act.[72] Similarly, under the so-called *Noerr* doctrine[73] this Court has recognized that anticompetitive practices by private parties are, under certain circumstances, entitled to First Amendment protection where they involve efforts to influence government policy making functions. This Court has made clear from the beginning, however, that this latter exemption from the Sherman Act did not extend to anticompetitive practices where the government involvement was of a commercial rather than policy making nature. To hold otherwise would contravene the "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade",[74] which represents a "fundamental national economic policy."[75] Thus in *Continental Ore Co. v.*

[71]317 U.S. 341 (1943).

[72]15 U.S.C. §1 ff (1970 ed.). While some lower court decisions have expanded the Parker exemption to direct government participation in the marketplace, this Court has never directly addressed that issue. In view of this Court's repeated insistence that exemptions from the antitrust laws be strictly construed, Federal Maritime Comm'n v. Seatrain Ltd., 93 S.Ct. 1773 (1973), Otter Tail Power Co. v. U.S., 93 S.Ct. 1523 (1973), there is considerable question as to the validity of such an expansive interpretation of the Parker doctrine.

[73]Eastern Railroad President's Conference v. Noerr Motor Freight Inc., 365 U.S. 127 (1961).

[74]Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[75]Gulf States Utility Co. v. F.P.C., 93 S.Ct. 1870, 1878 (1973).

Union Carbide Corp.[76] this Court held that the defendant's status as the duly authorized exclusive purchasing and distribution agent of the Canadian government for all Canadian wartime requirements of vanadium did not immunize from antitrust scrutiny its alleged exclusion of the plaintiff, a vanadium producer, from the Canadian market. The policies and strictures of the Sherman Act were held applicable to such anticompetitive practices even though conducted under the aegis of discretionary authority conferred by the Canadian government:

> In this case respondent's conduct is wholly dissimilar to that of the defendant's in Noerr. Respondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws. To subject them to liability under the Sherman Act by eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr.[77]

See also California Motor Transport v. Trucking Unlimited where the Court cited *Continental Ore* with approval for the proposition that "Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression."[78]

---

[76]370 U.S. 690 (1962).

[77]370 U.S. at 708.

[78]404 U.S. 508, 513 (1972). This decision is also significant in that it made substantial inroads into the blanket immunity established by Noerr for attempts to influence government policy determinations, holding that this immunity did not extend to a campaign to restrict the free and unlimited access of one's competitors to government tribunals. This restriction of Noerr reflects this Court's concern for narrowing so far as possible any exceptions to the basic policy established by the Sherman Act.

Subsequent decisions of the lower Federal courts have further articulated this distinction between government policy making and government enterprise functions. In applying the Federal antitrust laws to private actions intertwined with the latter, the courts have emphasized the significant economic importance of government acting as an economic unit and the serious potential threats to competition presented if such activities were totally immune from judicial restraint.[79] In *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*[80] the court held that an alleged conspiracy to influence public purchasing officials to adopt the defendant's proprietary

---

[79]*See* Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV.L.REV. 847, 851, 852 (1968).

> In 1966, federal, state and local governments spent over 150 billion dollars, about one-fifth of the gross national product, in the purchase of goods and services. No unit that purchases over one-tenth of the GNP, as does the federal government alone, is just another buyer, but in many transactions governments behave much like other large economic units. Whenever a government is victimized by trade restraints, all those who must finance its expenditures are injured also; and the consequent misallocation of resources in the economy as a whole may be quite severe. When directly participating in the economy as an individual economic unit, a government can best advance the public's interest in economy and efficiency by responding to the economic signals of a properly functioning market. Only then can it be certain that it is able to maximize the utility of its expenditures. Moreover, since governments purchase such a large portion of the gross national product, employing the Sherman Act to require of those who deal with government the same standards of conduct as those prescribed for dealings with other economic units could significantly advance the Act's policy of promoting a competitive market in the national economy.

[80]424 F.2d 25 (1st Cir.), *cert. den.* 400 U.S. 850 (1970).

specifications for pipeless swimming pools was subject to the Sherman Act. Even though the market for such swimming pools involved almost exclusively "public bodies or private bodies using public funds"[81] the court rejected the blanket argument that any restraint of trade resulting from valid governmental action or efforts to influence the same was immune from the Federal antitrust laws and remanded the case for trial:

> We hold only that the legality of Paddock's selling methods is to be judged without regard to whether its customer is a private consumer or a public official acting under a competitive bidding statute. Those who sell to private developers under competitive bidding procedures have never enjoyed antitrust immunity. We doubt whether applying the same standard to dealings with public customers will prompt a wholesale repudiation of contracts or hamstring the efforts of public bodies to buy desirable products. On the other hand, we think that such an even-handed rule will promote the policy of free and unfettered competition which underlies the Sherman Act. Government is the largest single customer in our economy, with expenditures amounting to over $150 billion in 1966.
>
> * * * * *
>
> To hold that Paddock's conduct is exempt in such circumstances would be tantamount to a grant of total immunity for commercial dealings with the government. Our national reliance on the market to efficiently allocate resources would be misplaced if dealings with the nation's largest customer were totally exempt. We therefore hold that efforts to influence government officials acting under statutes requiring competitive bidding are within the scope of the antitrust laws.[82]

---

[81] 424 F.2d at 27.

[82] 424 F.2d at 34 (Footnotes omitted).

Similarly, in *Hecht v. Pro-Football, Inc.*[83] the court, relying upon the *Continental Ore* and *Paddock Pool* decisions, held that a stadium lease between the D.C. Armory Board and a professional football team incorporating a restrictive covenant prohibiting use of the stadium by any professional football team other than the lessee "must be tested in accordance with the United States antitrust laws as usually applied to contracts between private parties."[84]

We do not argue that the City of Pittsburgh's action in the instant case should be held subject to the antitrust laws; we assume for the present that as a governmental body, the city remains immune from damage actions based upon the Sherman Act under the doctrine of *Parker v. Brown.*[85] The present cause of action is founded upon the Takings Clause, however, which clearly does apply to the actions of government and its instrumentalities. We submit that the judicial concern for the adverse competitive impacts where government acts in an enterprise capacity reflected in these antitrust decisions is, as the court below quite properly noted, equally relevant in interpreting the Takings Clause:

> This governmental enterprise competing with private enterprise adds not only a new and most significant dimension to the traditional constitutional problem

---

[83]444 F.2d 931 (D.C. Cir. 1971).

[84]444 F.2d at 947. *See also* Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972); Woods Exploration and Producing Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. den.* 404 U.S. 1047 (1972), where the court noted that:

> The policies of the Sherman Act should not be sacrificed simply because defendants employ governmental processes to accomplish anti-competitive means. Otherwise, with governmental activities abounding about us, government could engineer many to antitrust havens.

438 F.2d at 1296, 1297.

[85]317 U.S. 341 (1943).

of what constitutes a taking without due process, but also an impermissible one.[86]

III.

AN UNCONSTITUTIONAL TAKING OCCURS WHERE GOVERNMENT ENHANCES ITS COMPETITIVE POSITION BY LEVYING A TAX CAUSING SUBSTANTIAL ECONOMIC HARM TO ITS DIRECT PRIVATE SECTOR COMPETITORS

The Takings Clause establishes standards of fairness and justice proscribing government action which arbitrarily and selectively imposes burdens upon particular persons. In *National Board of Y.M.C.A. v. United States,*[87] this fundamental Constitutional protection was described as follows:

> The Just Compensation Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40 (1960); see also United States v. Sponenbarger, 308 U.S. 256, 260 (1939)[2]

---

[2]For a general discussion of the purposes of the Just Compensation Clause, see Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964). (Footnote by the Court).

The Takings Clause thus presents a bar where government, acting for its own advantage, imposes a substantial economic burden upon a select group of individuals or firms in the private sector. For example, in *Armstrong v.*

---

[86]307 A.2d at 864.

[87]395 U.S. 85 (1969).

United States,[88] the United States, by taking title to certain unfinished vessels and related material following a contractor's default, rendered unenforceable materialmen's liens held by suppliers of the contractor. The Court held that this selective burden imposed upon the materialmen was a compensable taking, emphasizing that "the Government was the direct, positive beneficiary."[89] Similarly, this Court has ruled that the Takings Clause prohibits an exercise of government regulatory powers which would require a business to continue operations at a loss, even though continued operation would serve the public interest. Thus in *Brooks-Scanlon v. R.R. Comm'n*,[90] this Court rejected the argument that a regulatory commission could constitutionally compel a company to continue unprofitable operations of a railroad subsidiary indefinitely:

> A carrier cannot be compelled to carry on even a branch of a business at a loss, much less the whole business of carriage.

Railroad Comm'n v. Eastern Texas R.R.[91] is to the same effect:

> To compel it to go on at a loss or to give up the salvage value would be to take its property without . . . just compensation. . . .

These cases reflect the same prohibition against government action which would have the effect of sacrificing

---

[88]364 U.S. 40 (1960).

[89]360 U.S. at 49.

[90]251 U.S. 396, 399 (1920).

[91]264 U.S. 79, 85 (1924). *See also* City of New York v. United States, 337 F.Supp. 150 (E.D.N.Y. 1972); *In re* New York, New Haven & Hartford Railroad Co., 330 F.Supp. 131 (D.Conn. 1971); Note, *Takings and the Public Interest in Railroad Reorganization*, 82 YALE L.J. 1004 (1973).

the profits of a select group of individuals or companies in the interest of a so-called "public benefit."

This fundamental principle underpinning the Takings Clause has been articulated thoroughly by Professor Joseph Sax in *Takings and the Police Power.*[92] Professor Sax notes that the Takings Clause was drafted out of a concern for government action appropriating private property for use in public enterprise activity. Without a requirement of compensation, it was feared there would be too great a danger of arbitrary action favoring public enterprise at the direct expense of private individuals. Thus he notes Sir George Tucker's following observation:

> That (provision) which declares that private property shall not be taken for public use without just compensation, was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever.[93]

The severe tax burden which Pittsburgh has selectively imposed upon its direct competitors under circumstances which substantially eliminate their profitability and thus enhance its own competitive position is thus a government action squarely within the proscription of the Takings Clause. Professor Sax's discussion of the proper analysis of such a selective and burdensome taxing measure under the Takings Clause merits quotation at some length:

> Likewise, it is recognized that every tax technically fits the description of a taking as formulated

---

[92]74 YALE L.J. 36 (1964).

[93]74 YALE L.J. at 58 (Quoting from TUCKER'S BLACKSTONE, COMMENTARIES 305-06 (appendix) (1803)).

here (just as it does, incidentally, under the old Harlan invasion theory). But here, too, the temptation to turn the proposed rule into an intellectual plaything must yield to an attempt to find workable rules for a real world. *Of course a government act is not immunized from the compensation provision of the Constitution merely because it has been labelled a tax.* But most taxes are not takings because they incorporate precisely the goal which the compensation rule is designed to achieve: they spread the cost of operating the governmental apparatus throughout the society rather than imposing it upon some small segment of it. Once that cost has been broadly diffused, though perhaps not to every member of the society nor to each in identical amount, it would seem that the essential problem of the taking provision, as delineated earlier, would be overcome.

With these perspectives in mind, it should be possible to approach the problem fruitfully. In essence, a court ought to ask itself these questions: first, does this case raise the sort of issue with which the taking provision was designed to deal; that is, does it present a case of essentially individualized cost-bearing of some public improvement? If the answer to this question is no, as it is with most tax measures, then the constitutional issue may be dismissed forthwith. Second, is some privilege being invoked which must be recognized as an exception to the compensation rule, such as the right to impose fines in a criminal proceeding? Unless the answer here is yes, we must then go on to ask the last question: is the loss incurred here a consequence of resource-acquisition by a governmental enterprise? The response to that final question should determine the issue of compensation.[94]

---

[94] 74 YALE L.J. at 75, 76. (Emphasis added).

This prescient analysis specifically anticipated the issues here presented and demonstrates the unconstitutionality of this tax. First, this gross receipts tax selectively imposed upon commercial parking garage operators is not broadly diffused; in the context of favored competition at lower rates from the Parking Authority which prevents the commercial operators from passing the burden on to customers, this gross receipts tax imposes the very "individualized cost-bearing" which the Takings Clause proscribes. Nor does Pittsburgh purport to invoke any public right or other recognized exception from the compensation rule, other than a non-existent exception for revenue measures. Finally, it is clear that the detriment imposed upon the parking garages flows directly from the favored direct competition of a government enterprise, the Parking Authority. As Professor Sax has noted, this "should determine the issue of compensation."

A brief review of the operative facts presented in this case demonstrates the devastating impact of the Parking Tax Ordinance in the presence of favored direct competition from the Parking Authority.[95] The private parking industry in Pittsburgh sustained substantial operating losses after the enactment of this 20% gross receipts tax in 1970. These losses could not be mitigated through increased rates; as the Commonwealth Court found

> The appellants are unable to pass the tax on to customers, not only because customers cannot and will not pay higher rates but also because the appellants are in competition with a public

[95] Amici base this review upon the unanimous findings of the Commonwealth Court, which noted that the relevant findings were based on "undisputed evidence." 291 A.2d at 560, 561.

authority which, exempt from other taxes, can charge less.[96]

Absent judicial relief, the necessary effect of the Parking Tax Ordinance would have been to force a significant number of commercial operators in the City of Pittsburgh out of business.[97] This significant reduction in competition from the private sector would redound to the direct benefit of the Parking Authority, leaving it with significantly enhanced control over the relevant market. This is precisely the circumstance in which, if private enterprise is to survive in the face of government competition, the Takings Clause must be construed to require compensation.

CONCLUSION

Amici have sought to demonstrate that invalidation of this selective and excessive tax, in addition to remedying the fundamental unfairness with which the City of Pittsburgh has treated its private sector competitors, will set an important and necessary precedent limiting the abuse of sovereign powers to gain unfair competitive advantage for government enterprise.

In view of the competition between government and the private sector which pervades our economy, a decision upholding this tax would portend serious consequences for all private sector firms confronted with unfair government competition. Our national policy against such unfair competition with the private sector thus requires that this tax be struck down.

The Takings Clause bars arbitrary government action which selectively imposes excessive burdens upon parti-

---

[96] 291 A.2d at 561.

[97] City of Pittsburgh Ordinance No. 30 of 1973, effective April 1, 1973, replaced the gross receipts tax upon the operators with an excise tax upon the patron of the parking facility. This latter tax is not at issue in the instant suit.

cular persons for the government's own benefit. In the context of direct and favored competition from the Parking Authority, this is precisely the effect of the 20% gross receipts tax imposed by the City of Pittsburgh.

Accordingly, amici respectfully submit that this tax must be found unconstitutional.

JAMES S. HOSTETLER
PAUL S. MC AULIFFE
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Of Counsel:

GADSBY & HANNAH
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CITY OF PITTSBURGH *v.* ALCO PARKING CORP. ET AL.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 73-582. Argued April 15, 1974—Decided June 10, 1974

Respondent operators of offstreet parking facilities in Pittsburgh, Pa., sued to enjoin the enforcement of a city ordinance imposing an increased 20% tax on the gross receipts from parking or storing automobiles at nonresidential parking places, alleging, *inter alia*, that the ordinance was invalid under the Due Process Clause of the Fourteenth Amendment. The lower courts sustained the ordinance, but the Pennsylvania Supreme Court invalidated it on the ground that the tax was so unreasonably high and burdensome that, in the context of competition from public lots operated by the city parking authority, which enjoyed certain tax exemptions and other advantages, the ordinance had the "effect" of an uncompensated taking of property contrary to the Due Process Clause. *Held:* The ordinance is not unconstitutional, and the city was constitutionally entitled to put the automobile parker to the choice of using other transportation or paying the increased tax. Pp. 4–10.

(a) The fact that a tax is so excessive as to render a business unprofitable or even threaten its existence furnishes no ground for holding the tax unconstitutional, *Magnano Co.* v. *Hamilton*, 292 U. S. 40; *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, and the judiciary should not infer from such fact, alone, a legislative attempt to exercise a forbidden power in the form of a seeming tax. Pp. 4–7.

(b) The ordinance does not lose its character as a tax or revenue-raising measure and may not be invalidated as too burdensome under the Due Process Clause merely because the taxing authority, directly or through an instrumentality enjoying various forms of tax exemption, competes with the taxpayer in a manner that the judiciary thinks is unfair, since the Due Process Clause does not demand of or permit the judiciary to undertake to separate burdensome and nonburdensome taxes or to oversee the terms and cir-

Syllabus

cumstances under which the government or its tax-exempt instrumentalities may compete with the private sector. Pp. 7–8.

453 Pa. 245, 307 A. 2d 851, reversed.

WHITE, J., delivered the opinion for a unanimous Court. POWELL, J., filed a concurring opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73–582

City of Pittsburgh, Petitioner, *v.* Alco Parking Corporation et al. | On Writ of Certiorari to the Supreme Court of Pennsylvania for the Western District.

[June 10, 1974]

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is the validity under the Federal Constitution of Ordinance No. 704, which was enacted by the Pittsburgh, Pennsylvania, City Council in December 1969, and which placed a 20% tax on the gross receipts obtained from all transactions involving the parking or storing of a motor vehicle at a nonresidential parking place in return for a consideration.[1] The ordinance

[1] The ordinance defined a nonresidential parking place as follows:

"(c) 'Non-Residential Parking Place' or 'Parking Place'—any place within the City, whether wholly or partially enclosed or open, at which motor vehicles are parked or stored for any period of time in return for a consideration not including:

"(i) any parking area or garage to the extent that it is provided or leased to the occupants of a residence on the same or other premises for use only in connection with, and as accessory to, the occupancy of such residence, and (ii) any parking area or garage operated exclusively by an owner or lessee of a hotel, an apartment hotel, tourist court or trailer park, to the extent that the parking area or garage is provided to guests or tenants of such hotel, tourist court or trailer park for no additional consideration.

"As used herein, the term 'residence' includes (i) any building designed and used for family living or sleeping purposes other than

superseded a 1968 ordinance imposing an identical tax, but at the rate of 15%, which in turn followed a tax at the rate of 10% imposed by the city in 1962. Soon after its enactment, 12 operators of offstreet parking facilities located in the city sued to enjoin enforcement of the ordinance, alleging that it was invalid under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as Art. VIII, § 1, of the Pennsylvania Constitution, which requires that taxes shall be uniform upon the same class of subjects. It appears from the findings and the opinions in the state courts that, at the time of suit, there were approximately 24,300 parking spaces in the downtown area of the city, approximately 17,000 of which the respondents operated. Another 1,000 were in the hands of private operators not party to the suit. The balance of approximately 6,100 was owned by the Parking Authority of the city of Pittsburgh, an agency created pursuant to the Parking Authority Law of June 5, 1947, Pa. Stat. Ann., Tit. 53, § 341 *et seq.* The trial court also found that there was then a deficiency of 4,100 spaces in the downtown area.

The Court of Common Pleas sustained the ordinance. Its judgment was affirmed by the Commonwealth Court by a four-to-three vote, 6 Pa. Commonwealth Ct. 433, 291 A. 2d 556 (1972); on rehearing, 6 Pa. Commonwealth Ct. 453, 295 A. 2d 349 (1972), but the Pennsylvania Supreme Court reversed, also four to three. 453 Pa. 245, 307 A. 2d 851 (1973). That court rejected challenges to the ordinance under the Pennsylvania Constitution and the Equal Protection Clause, but invalidated the ordinance as an uncompensated taking of property

---

a hotel, apartment hotel, tourist court or trailer park, and (ii) any dwelling unit located in a hotel or apartment hotel.

"The terms 'hotel,' 'apartment hotel,' 'tourist court,' 'trailer park' and 'dwelling unit' are used herein as defined in the Zoning Ordinance, Ordinance No. 192, approved May 10, 1958, as amended."

contrary to the Due Process Clause of the Fourteenth Amendment. Because the decision appeared to be in conflict with the applicable decisions of this Court, we granted certiorari, — U. S. —, and we now reverse the judgment.[2]

In the opinion of the Supreme Court of Pennsylvania, two aspects of the Pittsburgh ordinance combined to deprive the respondents of due process of law. First, the court thought the tax was "unreasonably high" and was responsible for the inability of nine of 14 different private parking lot operators to conduct their business at a profit and of the remainder to show more than marginal earnings. 453 Pa., at 259–260, 307 A. 2d, at 859–860. Second, private operators of parking lots faced competition from the Parking Authority, a public agency enjoying tax exemption (although not necessarily from this tax) [3]

[2] It appears from the opinion of the Pennsylvania Supreme Court that Ordinance No. 704 was itself superseded while appeal was pending in the state courts. 453 Pa., at 266 n. 13, 307 A. 2d, at 863 n. 13. The new ordinance, effective April 1, 1973, imposed a 20% tax on the consideration paid in nonresidential parking transactions, the tax to be collected from the patron by the operator. This case is not mooted by the new ordinance, however, for there remains the issue of substantial refunds of taxes collected under Ordinance No. 704.

[3] The ordinance on its face applies to all nonresidential parking transactions. The following, however, appears in n. 9 of the opinion of the Pennsylvania Supreme Court, 453 Pa., at 265, 307 A. 2d, at 862:

"As of this writing, the Allegheny County Court of Common Pleas has ruled that the Public Parking Authority is exempt from payment of the challenged gross receipts tax. *Public Parking Authority of Pittsburgh* v. *City of Pittsburgh*, No. 687, July Term, 1972. See *Allegheny County* v. *Moon Township*, 436 Pa. 54, 258 A. 2d 630 (1969). An appeal is presently pending before the Commonwealth Court.

"However, whether the Public Parking Authority is subject to the tax seems to make little real difference in the context of this present dispute. Even if the Authority had to pay the tax to the City it

and other advantages which enabled it to offer offstreet parking at lower rates than those charged by private operators. The average all-day rate for the public lots was $2.00 as compared with a $3.00 all-day rate for the private lots. *Ibid.* The court's conclusion was that "[w]here such an unfair competitive advantage accrues, generated by the use of public funds, to a local government at the expense of private property owners, without just compensation, a clear constitutional violation has occurred.... [T]he unreasonably burdensome 20% gross receipts tax, causing the majority of private parking lot operators to operate their businesses at a loss, in the special competitive circumstances of this case, constitutes an unconstitutional taking of private property without due process of law in violation of the Fourteenth Amendment of the United States Constitution." 453 Pa., at 266, 269–270, 307 A. 2d, at 863, 864.

We cannot agree that these two considerations, either alone or together, are sufficient to invalidate the parking tax ordinance involved in this case. The claim that a particular tax is so unreasonably high and unduly burdensome as to deny due process is both familiar and recurring, but the Court has consistently refused either to undertake the task of passing on the "reasonableness" of a tax that otherwise is within the power of Congress or of state legislative authorities, or to hold that a tax is unconstitutional because it renders a business unprofitable.

In *Magnano Co.* v. *Hamilton*, 292 U. S. 40 (1934), the Court sustained against due process attack a state excise tax of 15¢ per pound on all butter substitutes sold in the

---

would mean only in reality an accounting transaction, transferring dollars from one pocket of an instrumentality of City government to another. Thus although appellants' argument would be strengthened by the common pleas court's decision, we need not presently rest our decision upon *Public Parking Authority of Pittsburgh* v. *City of Pittsburgh*, supra."

State. Conceding that the "tax is so excessive that it may or will result in destroying the intrastate business of appellant," the Court held that "the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress," that no different rule should be applied to the States, and that a tax within the lawful power of a State should not "be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses." *Id.*, at 44–45. The premise that a tax is invalid if so excessive as to bring about the destruction of a particular business, the Court said, had been "uniformly rejected as furnishing no juridical ground for striking down a taxing act." *Id.*, at 47. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548 (1869); *McCray* v. *United States*, 195 U. S. 27 (1904); and *Alaska Fish Co.* v. *Smith*, 255 U. S. 44 (1921), are to the same effect.

In *Alaska Fish*, a tax on the manufacture of certain fish products was sustained, the Court saying, 255 U. S., at 48–49: "Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk .... We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation." See also *International Harvester Co. v. Wisconsin Department of Taxation*, 322 U. S. 435, 444 (1944); *Child Labor Tax Case*, 259 U. S. 20, 30 (1922); *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24 (1916); *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 168–169 (1911).

Neither the parties nor the Pennsylvania Supreme Court purport to differ with the foregoing principles. But the state court concluded that this was one of those "rare and special instances" recognized in *Magnano* and other cases where the Due Process Clause may be invoked

because the taxing statute is "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." 292 U. S., at 44.[4]

There are several difficulties with this position. The ordinance on its face recites that its purpose is "to provide for the general revenue by imposing a tax . . . ," and in sustaining the ordinance against an equal protection challenge, the state court itself recognized that commercial parking lots are a proper subject for special taxation and that the city had decided, "not without reason, that commercial parking operations should be singled out for special taxation *to raise revenue* because of traffic related problems engendered by these operations." 453 Pa., at 257, 307 A. 2d, at 858 (emphasis added).

It would have been difficult from any standpoint to have held that the ordinance was in no sense a revenue measure. The 20% tax concededly raised substantial sums of money; and even if the revenue collected had been insubstantial, *Sonzinsky* v. *United States*, 300 U. S. 506, 513–514 (1937), or the revenue purpose only secondary, *Hampton & Co.* v. *United States*, 276 U. S. 394, 411–413 (1928), we would not necessarily treat this exaction as anything but a tax entitled to the presumption of the validity accorded other taxes imposed by a State.

Rather than conclude that the 20% levy was not a tax at all, the Pennsylvania court accepted it as such and

[4] Compare *Heiner* v. *Donnan*, 285 U. S. 312, 326 (1932); *Nichols* v. *Coolidge*, 274 U. S. 531, 542 (1927); *Child Labor Tax Case*, 259 U. S. 20, 37 *et. seq.* (1922); *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24–25 (1916); *McCray* v. *United States*, 195 U. S. 27, 60 (1904); *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614–615 (1899); *McCulloch* v. *Maryland*, 4 Wheat. 316, 423 (1819).

merely concluded that it was so unreasonably high and burdensome that, in the context of competition by the city, the ordinance had the "effect" of an uncompensated taking of property. 453 Pa., at 269, 307 A. 2d, at 864. The court did not hold a parking tax, as such, to be beyond the power of the city but it appeared to hold that a bona fide tax, if sufficiently burdensome, could be held invalid under the Fourteenth Amendment. This approach is contrary to the cases already cited, particularly to the oft-repeated principle that the judiciary should not infer a legislative attempt to exercise a forbidden power in the form of a seeming tax from the fact, alone, that the tax appears excessive or even so high as to threaten the existence of an occupation or business. *Magnano & Co.* v. *Hamilton, supra,* at 47; *Child Labor Tax Case, supra,* at 40–41; *Veazie Bank* v. *Fenno, supra,* at 548.

Nor are we convinced that the ordinance loses its character as a tax and may be stricken down as too burdensome under the Due Process Clause if the taxing authority, directly or through an instrumentality enjoying various forms of tax exemption, competes with the taxpayer in a manner thought to be unfair by the judiciary. This approach would demand not only that the judiciary undertake to separate those taxes that are too burdensome from those that are not, but also would require judicial oversight of the terms and circumstances under which the Government or its tax-exempt instrumentalities may undertake to compete with the private sector. The clear teaching of prior cases is that this is not a task that the Due Process Clause of the Federal Constitution demands of or permits to the judiciary. We are not now inclined to chart a different course.

In *Veazie Bank, supra,* a 10% tax on state bank notes was sustained over the objection of the dissenters that

the purpose was to foster national banks, instrumentalities of the National Government, in preference to private banks chartered by the States. More directly in point is *Puget Sound Co.* v. *Seattle*, 291 U. S. 619 (1934), where the city imposed a gross receipts tax on a power and light company and at the same time actively competed with that company in the business of furnishing power to consumers. The company's contention was that "constitutional limitations are transgressed . . . because the tax affects a business with which the taxing sovereign is actively competing." *Id.*, at 623. Calling on prior cases in support, the Court rejected the contention, holding that "the Fourteenth Amendment does not prevent a city from conducting a public water works in competition with private business or preclude taxation of the private business to help its rival to succeed." *Id.*, at 626. See also *Madera Waterworks* v. *Madera*, 228 U. S. 454 (1913). The holding in *Puget Sound* remains good law and, together with the other authorities to which we have already referred, it is sufficient to require reversal of the decision of the Pennsylvania Supreme Court.

Even assuming that an uncompensated and hence forbidden "taking" could be inferred from an unreasonably high tax in the context of competition from the taxing authority, we could not conclude that the Due Process Clause was violated in the circumstances of this case. It was urged by the city that the private operators would not suffer because they could and would pass the tax on to their customers, who, as a class, should pay more for the services of the city that they directly or indirectly utilize in connection with the special problems incident to the twice daily movement of large numbers of cars on the streets of the city and in and out of parking garages. The response of the Pennsylvania Supreme Court was that competition from the city prevented the private

operators from raising their prices and recouping their losses by collecting the tax from their customers. On the record before us, this is not a convincing basis for concluding that the parking tax effected an unconstitutional taking of respondent's property. There are undisturbed findings in the record that there were 24,300 parking places in the downtown area, that there was an overall shortage of parking facilities, and that the public authority supplied only 6,100 parking spaces. Because these latter spaces were priced substantially under the private lots it could be anticipated that they would be preferred by those seeking parking in the downtown area. Insofar as this record reveals, for the 20% tax to have a destructive effect on private operators as compared with the situation immediately preceding its enactment, the damage would have to flow chiefly not from those who preferred the cheaper public parking lots, but from those who could no longer afford an increased price for downtown parking at all. If this is the case, we simply have another instance where the government enacts a tax at a "discouraging rate as the alternative to giving up a business," a policy to which there is no constitutional objection. *Alaska Fish Co.* v. *Smith*, *supra*, at 49; *Magnano & Co.* v. *Hamilton*, *supra*, at 46.

The Parking Tax Ordinance recited that "[n]onresidential parking places for motor vehicles, by reason of the frequency rate of their use, the changing intensity of their use at various hours of the day, their location, their relationship to traffic congestion and other characteristics, present problems requiring municipal services and affect the public interest, differently from parking places accessory to the use and occupancy of residences." By enacting the tax, the city insisted that those providing and utilizing nonresidential parking facilities should pay more taxes to compensate the city for the problems incident to

offstreet parking. The city was constitutionally entitled to put the automobile parker to the choice of using other transportation or paying the increased tax.

The judgment of the Pennsylvania Supreme Court is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 73–582

City of Pittsburgh, Petitioner, *v.* Alco Parking Corporation et al.

On Writ of Certiorari to the Supreme Court of Pennsylvania for the Western District.

[June 10, 1974]

MR. JUSTICE POWELL, concurring.

The opinion of the Court fully explicates the issue presented here, and I am in accord with its resolution. I write briefly only to emphasize my understanding that today's decision does not foreclose the possibility that some combination of unreasonably burdensome taxation and direct competition by the taxing authority might amount to a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments.

To some extent, private business is inevitably handicapped by direct governmental competition, but the opinion of the Court makes plain that the legitimate exercise of the taxing power is not to be restrained on this account. It is conceivable, however, that punitive taxation of a private industry and direct economic competition through a governmental entity enjoying special competitive advantages would effectively expropriate a private business for public profit. Such a combination of unreasonably burdensome taxation and public competition would be the functional equivalent of a governmental taking of private property for public use and would be subject to the constitutional requirement of just compensation. As the opinion of the Court clearly reveals, *ante*, at 8–9, no such circumstance has been shown to exist in the instant case.